Supreme Court U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

REBECCA A. JONES, EXECUTRIX OF THE ESTATE OF SCOTT R. JONES, DECEASED,
Petitioner,

v.

CONSOLIDATED RAIL CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case arises from the common railroad practice of stopping trains for extended periods of time near grade crossings equipped with federally mandated automatic warning devices. As long as the train is standing within the circuitry, the lights continue to flash and the gate arms remain down. If another train approaches while this condition exists, the system cannot give a "positive signal" that the arrival of another train is imminent. Numerous catastrophes, including the one that killed petitioner's decedent, have occurred under these conditions when railroads have failed to use alternate measures to compensate for the fact that automatic warning devices have been disabled from providing motorists with a positive signal that a train was approaching.

When petitioner's decedent arrived at the crossing, the lights had been flashing and the gate arms had been down for at least 10 minutes because a train had stopped near the crossing. Petitioner's decedent was killed by a train traveling 60 mph when he attempted to cross the tracks. The United States Court of Appeals for the Sixth Circuit held that a railroad has a duty to ensure only that the warning devices are mechanically operational and, accordingly, that the railroad in this case was under no legal duty to take measures to compensate for the fact that the standing train had interfered with the ability of the system to provide petitioner's decedent with an "active" or "positive" signal that a train was approaching.

The question presented by this petition is as follows: When a train stops near a grade crossing after causing a mechanical activation of federally mandated automatic warning devices, does federal law require the use of alternate measures for the safety of motorists if another train

approaches the crossing while the warning system is disabled from providing a positive signal that the arrival of another train is imminent?

PARTIES TO THE PROCEEDING

Petitioner Rebecca A. Jones, Executrix of the Estate of Scott R. Jones, appeared as Plaintiff-Appellant in the Sixth Circuit proceeding. Respondent Consolidated Rail Corporation appeared as Defendant-Appellee in the Sixth Circuit proceeding.

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The order of the United States Court of Appeals for the Sixth Circuit affirming the judgment in favor of Consolidated Rail Corporation is reproduced in the petitioner's appendix at App. B. The order of the United States Court of Appeals for the Sixth Circuit denying petitioner's petition for rehearing *en banc* is reproduced in petitioner's appendix at App. A. (There are no official citations to these orders.)

JURISDICTION

The judgment of the court of appeals was entered on December 18, 1997. (App. B, p.3a.) Petitioner filed a timely petition for rehearing on January 5, 1998, which was denied by the court of appeals on February 6, 1998. (App. A, p.1a.) By orders dated April 28, 1998 and June 1, 1998, petitioner was granted extension of time to file with this Court her petition for writ of certiorari. The petition is due on or before July 6, 1998. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On the night of February 7, 1994, Scott Jones was driving home from work along the heavily traveled main highway between Orrville and Wooster, Ohio. Shortly after 6:00 p.m., he came upon a multi-track, main line railroad crossing equipped with flashing lights and gate arms near which the Consolidated Rail Corporation ("Conrail") routinely stops trains, sometimes for an hour or longer. So long as a train is stopped near the crossing, the gate arms remain down and the lights continue to flash. When another train approaches, therefore, the lights cannot begin to flash or

the gate arms descend to warn motorists that the arrival of a train is imminent.

At least ten minutes prior to the arrival of Scott Jones at the crossing, a train (INPI) had stopped near, but not in, the crossing, thus allowing the rush hour traffic to pass. It is not disputed that most motorists proceed when gate arms are down for an unusual length of time without the arrival of a train. In this case, the crew of the stopped train saw that traffic was proceeding in both directions, knew that a high speed train was due to arrive shortly, and recognized that the possibility of a catastrophic collision existed. The crew, however, took no measures to provide for the safety of highway traffic because Conrail's rules do not require alternate safety measures when, as frequently happens, a train traveling along a main line stops near a crossing after triggering the flashing lights and gate arms.

Witnesses who drove over the crossing prior to the arrival of Jones testified that it was apparent from the crest of a hill, about a quarter of a mile from the crossing, that the lights were flashing and the gate arms were down because of a train stopped on the north side of the crossing, something they had observed on many prior occasions. As Scott Jones approached the crossing behind a van filled with children, a witness observed him turn in his seat and look in a southerly direction. At that moment, unfortunately, a northbound train (ENS401) traveling 60 mph was just out of sight around a curve. (App. FF, p.193a.) The engineer of the approaching train observed the van filled with children moving slowly onto the crossing, followed by the Jones car. From the engine of the stopped INPI train, the conductor and engineer, who had a clear view of what was happening, believed that the approaching train might hit both vehicles. The onrushing train barely missed the van, but struck the Jones car

broadside, causing his death a short time later.

Proceedings in the Trial Court

Scott Jones's estate ("Jones") sued Conrail in the Northern District of Ohio. Deposition testimony taken from the crews of the stopped and moving trains showed that the railroad actually discourages its employees from taking safety measures, such as posting a flagger, when the normal functioning of flashing lights and gates is interfered with by a train standing near a main line crossing. (Russell depo. pp. 58-61, App. L, p.77a). In fact, the testimony of the engineer of the moving train shows that Conrail employees have been trained to think of highway users, who proceed around gates, as trespassers:

> Q: You treat them as trespassers?
>
> A: Somewhat.
>
> Q: . . . so you considered the people going over . . . the crossing while the gates and lights were operating as trespassers; is that correct?
>
> A. Basically. (North deposition p. 97, App. O, p.100a).

1. Jones's Motion for Summary Judgment

Citing federal regulations that require railroads to use alternate measures for the safety of motorists when automatic gates and lights are unable to function normally, petitioner moved for summary judgment. Jones argued that Conrail routinely stops trains near this crossing and, therefore, knew

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well in advance that the INPI train would cause an extended activation of the gates and lights. Jones contended that, since the INPI train had been stopped for at least 10 minutes prior to the arrival of Jones, there was undisputedly enough time for Conrail to take measures to compensate for the fact that the gates and lights could not function normally to warn motorists of danger. Jones argued that Conrail's failure to use alternate measures, at the very least, constituted negligence as a matter of law.

On November 2, 1995, the trial court held a hearing on Jones's motion during the course of which an exchange occurred between counsel for Conrail and the court that puts the issues raised by this petition into sharp relief:

> THE COURT: It seems to me the predicate this whole lawsuit turns on is whether or not the railroad has a duty of care to the traveling public where they have set up a situation that appears to constitute a malfunctioning gate.
>
> In that situation, do they have a duty beyond seeing that the gates work and the flashers work and the oncoming train, whatever it's traveling at, has its horn blowing and lights working?
>
> MR. HOWES: . . . It is not a malfunctioning gate, it is a functioning gate that is functioning properly.
>
> THE COURT: Well, it's functioning properly at the time of impact.
>
> MR. HOWES: No, it's functioning

properly at the time it came down, and at the time it was down, because there was a train within the crossing.

THE COURT: So if it's down there for five hours, it is a functioning gate?

MR. HOWES: It's not a malfunctioning gate.

THE COURT: What is it then? So nobody can go across that crossing for five hours? (TR at 47, 48, November 2, 1995, App. V, p.128a).

This exchange, in a nutshell, captures Conrail's position on the main issue raised by this petition. The railroad contends that, when it stops a train near a main line crossing, it is under no legal duty to take alternate measures to compensate for the fact that the normal functioning of automatic warning devices has been interfered with by the standing train.

In a Memorandum and Order filed on November 3, 1995, the trial court accepted Conrail's interpretation of federal law and ruled that there was no duty to use alternate measures to provide for the safety of motorists. Consequently, the court ruled that it was for the jury to determine, under Ohio law, whether Conrail had a duty to do more than it did to provide for the safety of Scott Jones. (Memorandum and Order of Trial Court, November 3, 1995, App. F, p.17a).

2. The Trial Court's Ruling Regarding Federal Preemption.

Conrail contended that, because the gates and lights

were mechanically operational, it had complied with the federal mandates and, therefore, Jones was barred as a matter of federal preemption from claiming the railroad had a duty to do anything more to prevent a train/car crash. The court found that the only justification for imposing a duty to provide substitute warning measures was under the "local safety hazard" exception to preemption authorized by the Federal Railroad Safety Act:

> A state may adopt or continue to enforce an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. §434 (Emphasis added.)

Accordingly, the trial court ruled that, although the Secretary of Transportation had already "covered the subject of the adequacy of the warning systems at crossings such as the one at issue," there nevertheless was a "question of fact whether this crossing constituted a local safety hazard . . . " and that the jury, therefore, could decide whether the railroad had exercised due care under Ohio law in light of the local safety hazard. (Order at p. 7, App. HH, p.204a) Necessarily implied in this ruling is the assumption that the warning system at the Back Orrville crossing provided Scott Jones with an adequate warning under federal substantive standards governing automatic warning devices.

3. The Trial Court's Jury Instructions

Jones requested an instruction that would have allowed the jury to find the railroad negligent as a matter of federal law. This request was denied and the trial court, consistent with its earlier rulings, treated the question of whether the railroad should have taken alternate measures to provide for the safety of motorists as an issue to be decided by the jury under Ohio law. The trial court did, however, grant Conrail's request for an instruction that Scott Jones was negligent as a matter of law for proceeding while the gate arms were down. By instructing the jury that Scott Jones was a lawbreaker, the court in this context virtually directed a finding for the railroad.

On May 8, 1996, the jury returned a verdict in favor of Conrail and the court entered judgment on that verdict.

4. Jones's Post-Trial Motions

Jones filed a motion for a new trial on the ground that the trial court's instructions had erroneously failed to incorporate duties imposed on railroads by federal law. Citing the need for an expeditious ruling to help stop the carnage occurring at grade crossings because of the widespread practice of stopping trains near main line crossings, Jones, in the alternative, requested that the court certify the issues raised by the new trial motion to the Ohio Supreme Court.

In a Memorandum Opinion filed on July 3, 1996, the trial court acknowledged that Jones's motion presented "a comprehensive and compelling argument . . . when the competing interests of the safety of the motoring public and the complexities of the operation of a railroad are

considered." The court ruled, however, that "the best opportunity for a definitive decision on the issues raised by . . . (Jones's) motion" was an appeal to the United States Court of Appeals for the Sixth Circuit. (App. C, p.12a). Accordingly, the court overruled Jones's motion for a new trial.

The Decision of the Sixth Circuit

Jones argued that the trial court erred by not instructing the jury that the railroad had a duty, under federal law, to use alternate safety measures when it knew that the gates and lights could not function normally to provide Scott Jones with a positive signal that a train was approaching. For its part, Conrail argued, as it had done in the trial court, that it is under no legal duty to do anything else to provide for the safety of motorists when a train stops near a main line crossing, regardless of how long the gates are caused to be down, so long as the system is mechanically functional and the approaching train sounds its horn.

In a *per curiam* decision filed on December 18, 1997, the Sixth Circuit affirmed the result below. The court held that, "because the warning device at the crossing was activated . . . a jury could reasonably conclude that Conrail did not breach its duty." (App. B, p.7a). (Emphasis added.)

Jones's Petition for Rehearing *En Banc*

On January 5, 1998, Jones filed a petition for rehearing *en banc*. Jones urged the court to reconsider its decision on the ground that it had mistakenly equated mechanical "activation" of gates and lights with the ability of the system to provide motorists with a positive warning signal as required by federal law.

Jones also advised the court that, since the date of the oral arguments, an Ohio appellate court had affirmed a $15 million dollar award (remitted from $25 million) against Conrail in case where a train had stopped near a main line crossing in Sandusky, Ohio to make mechanical repairs. In Wightman v. Consolidated Rail Corp., 94 Ohio App.3d 389 (1994); Erie County Court of Appeals, E-97-001 (1997) (App. G, p. 27a), a case also being handled by petitioner's counsel, the crew of the stopped train, like the engineer and conductor on the INPI train in Jones, knew that a dangerous situation existed and that high speed trains were due. Nevertheless, no measures were taken to provide for the safety of motorists. A freight train traveling 60 mph struck a passenger car, killing two teenage girls. Jones argued that, because the Wightman decision shows that Conrail routinely stops trains near main line crossings without taking alternate measures to provide for the safety of motorists, that case offers further proof that the intention of Congress is being undermined by the practice of stopping trains near main line crossings.

On February 6, 1998, the Sixth Circuit denied Jones's petition for rehearing *en banc*. (App. A, p.1a).

REASONS FOR GRANTING THE WRIT

I. WHEN A TRAIN STOPS NEAR A GRADE CROSSING AFTER CAUSING A MECHANICAL ACTIVATION OF FEDERALLY MANDATED AUTOMATIC WARNING DEVICES, FEDERAL LAW REQUIRES THE USE OF ALTERNATE MEASURES TO PROVIDE FOR THE SAFETY OF MOTORISTS IF ANOTHER TRAIN APPROACHES THE CROSSING WHILE THE WARNING SYSTEM IS DISABLED FROM PROVIDING A POSITIVE SIGNAL THAT THE ARRIVAL OF ANOTHER TRAIN IS IMMINENT.

This petition raises a question that profoundly affects the lives and safety of people required to use railroad crossings throughout the United States: Does federal law prohibit railroads from stopping freight trains near main line crossings, without taking substitute measures to compensate for the fact that the normal functioning of automatic warning devices has been interfered with by the standing train? By answering that question in the negative, the courts below have helped to expose a widespread misunderstanding of federal regulations intended to effectuate the purpose of Congress in appropriating billions of dollars for the installation of automatic warning devices at grade crossings throughout the United States. As a result of this confusion, hundreds of train/car collisions, similar to the Jones and Wightman catastrophes, are occurring at crossings equipped with automatic warning devices every year.

The decisions below reflect a fundamental misreading of federal regulations that essentially codify Supreme Court law that, as we will show, has been widely ignored by railroads and poorly understood by the courts. What is

needed to prevent many of the train/car collisions now being caused by the widespread practice of stopping trains near main line crossings, is a strong, clearheaded decision by this Court that elucidates the underlying purpose of a federal regulatory scheme that too often is being misinterpreted by railroads and courts alike. Before turning to the question of how this Court, in a stroke, can remedy this problem at little or no cost to railroads, it is appropriate to briefly examine the existing regulatory scheme.

1. The Federal Regulatory Scheme

In 1970, Congress enacted the Federal Railroad Safety Act to reduce accidents at railroad grade crossings and generally increase highway safety. Pursuant to this enactment, the Secretary of Transportation conducted a comprehensive study of railway crossings, to which Congress responded by enacting the Highway Safety Act of 1973. The latter statute made federal funds available to states to upgrade railroad crossings according to federally prescribed criteria. Under this national program, states are required, as a condition of federal funding for crossing upgrades, to maintain an inventory of railway crossings rated in accordance with their relative need for an automatic warning system. As funds become available, safety improvements are made at crossings in accordance with these ratings.

This federal program establishes criteria for determining when conditions at a particular crossing require automatic gates with flashing light signals. In that regard, 23 C.F.R. §646.214(b)(3)(i) (App. Z, p.175a) provides, in pertinent part, as follows:

> (3)(i) "Adequate warning devices," . . . are to include automatic gates with flashing light

signals when one or more of the following conditions exist:

> (A) Multiple main line railroad tracks.
>
> (B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.
>
> (C) High speed train operation combined with limited sight distance at either single or multiple track crossings.
>
> (D) A combination of high speeds and moderately high volumes of highway and railroad traffic. . . .

The crossing where Scott Jones met his death meets all these criteria.

2. The Federal Definition of "Adequate Warning Device"

At the very heart of the federal scheme for providing motorists with an "adequate warning," at crossings that meet the federal criteria, is the requirement that the warning devices give motorists a positive or active signal that a train is approaching. The regulations make a clear distinction between active warning systems, such as automatic gates and flashing lights and passive devices, such as signs, that merely indicate the presence of a crossing "but which do not change aspect upon the approach or presence of a train." 23 C.F.R. §646.204(i) (Emphasis added). (App. Z, p.174a).

Automatic gates with flashing light signals are, by

definition, active warning devices because they are able to "change aspect" upon the approach of a train. This is spelled out in 23 C.F.R. §646.204(j) as follows:

> Active warning devices means those traffic control devices activated by the approach or presence of a train, such as flashing lights, automatic gates and similar devices, as well as manually operated devices and crossing watchmen, all of which display to motorists a positive warning of the approach or presence of a train. (Emphasis added) (App. Z, p. 174a).

Taken together, these regulations create a federal standard to insure that motorists receive an adequate warning that a train is approaching within hazardous proximity to the crossing. Under the regulations, to be adequate, the warning must be "active;" that is, it must "display to motorists a positive warning of the approach or presence of a train." In the case of automatic gates and flashing lights, this is accomplished through a distinct three-step warning sequence. First, the lights "change aspect" by beginning to flash when a train enters the circuitry. Next, after a 3 to 5 second interval, the gate arms descend from a perpendicular to a horizontal position. The final event is the arrival of a train not sooner than 20 seconds after the lights begin to flash. Each part of the sequence is integral to the system's ability to provide motorists with a positive and credible signal that a train is approaching. (Emigh TR pp. 85-87, App. K, p.67a).

3. The Danger Posed by an Extended Activation

The railroad industry has known for many years that automatic warning systems rapidly lose credibility with motorists when lights continue to flash and gate arms remain down for an unusually long period of time without the arrival of a train. Several Conrail employees acknowledged that most drivers proceed around the gates under these circumstances and that this creates the foreseeable risk of a crash. (Emigh TR 94, App. K at p. 74a; Landis TR 188, App. N at p.98a; Russell TR 161, App. M at p.92a; North TR 219, App. P at p.106a; and Shellenberger TR 634, App. S at p.118a).

Extended activations are a major factor in explaining the appalling fact that a large percentage of all train/car collisions happen at crossings equipped with automatic warning devices. For example, of the 4,874 fatal crashes at railroad crossings between 1982 and 1992, 1,889 occurred at crossings with automatic warning devices. (App. II, p.218a). Because train/car collisions like the Jones and Wightman catastrophes can so easily be prevented through the use of alternate measures during an extended activation, these statistics reflect a tragic waste of human life and federal funds.

4. This Court's Decision in *Landrigan*

Long before the advent of automatic warning systems, this Court recognized how dangerous it is for a railroad to keep gate arms down for an unusually long period of time. In Baltimore & P.R. v. Catharine Landrigan, 191 U.S. 461, 48 L. Ed. 262, 24 S. Ct. 137 (1903), the railroad routinely allowed gates to remain down, regardless of whether or not the approach of a train was imminent. The plaintiff's decedent was struck and killed by a train as he crossed the

tracks. The Court found that, under such circumstances, the gates provided "warning of nothing" and had "no more relation to passing trains than the signal tower or any inanimate object at or near the crossing." Id. at 475. Consequently, the Court held that the plaintiff's decedent was not negligent as a matter of law for going around the gates. Landrigan succinctly anticipated the rationale of current regulations as follows:

> Gates at a railroad crossing have a useful purpose. Open, they proclaim safety to the passing public; closed, they proclaim danger; but, it is manifest, if they be open or closed, regardless of safety or danger, they cannot be notice of either * * * At times a railroad must have exclusive use of a crossing, but at such times it is its duty to close the gates. The use over, it is its duty to open them, and it cannot neglect that duty and claim the same consequence as if it had been performed.

191 U.S. at 475

The courts below, unlike the Landrigan court, failed to appreciate the basic nature of an active warning system. It cannot be doubted that the function of a warning system is to convey an accurate message to whomever is supposed to receive and heed it. For example, an "active" warning system, such as a fire alarm, works only when it transmits a message that is invariably translated into one of two possibilities: either danger is present or it is not. This is the essence of this Court's reasoning in Landrigan;

> One thing or condition [such as gates and lights] cannot be any certain evidence of

> another thing or condition [an approaching train] unless they invariably coexist. Of course, two things may occasionally coexist, but this furnishes no argument for the plaintiffs in error. It only raises the query: when do the things coexist? And, making an application to the pending case: when did the closed gates and passing train coexist?

Id. (Emphasis added.)

The Landrigan court, in the elegant language of the era, managed in a few paragraphs to summarize the entire purpose of the federally funded program to upgrade the safety of crossings with automatic warning devices. Taken as a whole, the federal regulations at issue are intended to ensure that the activation of gates and lights should, as the Landrigan court put it, "invariably coexist" with the approach of a train; and, if it does not, railroads should not be permitted to escape responsibility for a collision that reasonably could have been prevented by alternate safety measures.

The revered journalist Edward R. Murrow liked to say: "it is the obscure we see, the obvious takes longer." The rulings below overlooked the obvious fact that a device that cannot provide the warning it is intended to give is simply not functioning as a warning device. It seems almost too obvious to remark, in fact, that the function of automatic gates and lights is not merely to operate mechanically but, rather, to provide a positive signal that the arrival of a train is imminent. In Landrigan, the gate arms were mechanically operational when the watchman lowered them. But he was asleep when a train approached so the warning system was "useless." When Scott Jones approached the Back Orrville crossing, the flashing lights and gate arms were no more

capable of providing him with a positive signal that the arrival of a train was imminent than were the gate arms that confronted the highway user in Landrigan. Although the distinction between the mechanical and warning functions of automatic warning devices may, on careful reflection, seem obvious, the fact is that this distinction, so crucial to public safety, was missed by distinguished judges in the courts below.

The reasoning of the Sixth Circuit simply cannot be reconciled with Landrigan. The essence of the holding below is that mere "activation" is evidence of due care on the part of the railroad and failure to take compensatory measures is arguably reasonable, so long as the gates and lights are mechanically functional. In so ruling, the Court of Appeals adopted the arguments advanced by Conrail in its appellate brief. Conrail contended that it did, in fact, have an "active" warning device in operation at the time of the collision because "the automatic gates operated as designed, signaling the approach and presence of INPI-7." (Conrail's Brief, pp. 25, 26, App. GG, p. 195a). Since the INPI train had been stopped for at least 10 minutes when Scott Jones arrived, this argument is simply another way of saying that the railroad claims the right to keep trains standing near crossings as long as it wishes, so long as the automatic warning devices are not malfunctioning mechanically. It is hard to imagine how the issue raised by this petition could be more starkly stated than this.

Because the courts below accepted Conrail's argument that mere activation is enough to meet the warning requirements established by federal law, the courts treated the issue of whether Scott Jones was provided an "adequate" warning as a matter to be decided by the jury under Ohio law. The net result of the approach reflected by this decision is that

the jury is given the responsibility of determining whether and when highway users are entitled to a positive signal that the arrival of a train is imminent. This approach invites a whimsical treatment of Congressional intent that, in many cases, has served to put the lives and safety of motorists at the mercy of railroads with catastrophic results.

5. Conflicting Decisional and Statutory Law

Other courts have missed the distinction between "activation" and "active warning," as the latter term is defined within the federal regulations. As a consequence, railroads have been allowed in many cases to continue a practice that puts the lives and safety of people at risk and, thereby, wastes billions in federal funds intended to reduce train/car collisions. What follows are a few examples intended to show how badly needed is this Court's intervention in an area that touches the lives and safety of so many people.

In McDowell v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co., 507 F.2d 5 (8th Cir. 1974), a man was instantly killed when his car was struck by a train at an intersection where, on numerous occasions, crossing gates and lights had been activated when no train was approaching. As in the instant case, the court in McDowell concluded that because the warning devices were "activated", they were, in fact, "operating properly" in the sense that they were capable of adequately warning motorists that the arrival of a train was imminent.

In Frankenthal v. Grand Trunk W. R.R. Co., 120 Ill. App. 3d 409, 458 N.E.2d 530 (Ill. App. Ct. 1983), another case similar to the one at hand, the court found that the jury was warranted in allocating 95% of the contributory fault to the motorist for proceeding around lowered gates that had

been activated for 10 minutes. The court reasoned that, so long as the gates were activated and the lights were flashing, they were operating as intended. Id. at 535.

Other courts have dealt with this issue by ignoring the conduct of the railroad and shifting their focus entirely to the driver's failure to heed activated warning devices. For example, in Hamilton v. Allen, 852 P.2d 697 (Okla. 1993), a train/car collision occurred at a crossing at which there had been a long history of extended activations. The court held that the motorist's failure to heed the activated warning signals exonerated the railroad company from any liability. Similarly, in the case at hand, the trial court effectively directed a verdict for the railroad by instructing the jury that Scott Jones was negligent as a matter of law, while leaving to the jury the question of whether or not the railroad had breached any duty of care owed by law to Scott Jones. This approach turns the moral economy implicit in the federal regulatory scheme upside down, and thereby encourages railroads to engage in practices that deprive motorists of an adequate warning as required by federal law.

A few courts have recognized the distinction between "activation," on the one hand and, on the other, "active warning," as that term is defined in federal regulations. For example, the court in Trabeau v. Mack Trucks, Inc., 547 So.2d 1381 (La. Ct. App. 1989); cert. den. 550 So.2d 651 (La. 1989), held that an automatic warning system that had been activated for a week without a train approaching was defective and placed the public under an unreasonable risk of harm. The Trabeau court noted that the railroad's duty to provide a properly operating device not only included a risk of harm resulting from a non-operating system, but also the risk of harm from a continuously operating system. Id. at 1383. In Witham v. Norfolk & W. Ry. Co., 561 N.E.2d 484

(Ind. 1990), a case similar to Trabeau, the court found that a genuine issue of fact existed regarding the adequacy of the warning because the flashing lights had been activated for 24 hours prior to the collision.

Although the Trabeau and Witham courts did not specifically base their rulings on an interpretation of "active warning" as defined by federal regulations, these decisions nevertheless recognize that the basic purpose underlying the federal regulations would be put to naught if railroads are allowed, willy-nilly, to deprive motorists of an active or positive signal that the arrival of a train is imminent. These cases, therefore, are relevant to this petition because they underscore the fact that the outcome of cases like Jones and Wightman currently depends more on the fortuity of where a case happens to be tried, than on a coherent understanding by courts of congressional intent expressed in these federal regulations.

In summary, then, the fact that only a few courts have been able to correctly interpret the nature of an active warning, as defined by the regulations, dramatically illustrates the need for this Court to bring rationality to a seemingly complicated, but basically simple, issue.

Further complicating the matter is the fact that some states have attempted to address the problem of extended activations by imposing statutory duties on railroads. In Michigan, for example, active traffic control devices can operate for no longer than two minutes "if there is no intention to move a train or track equipment through the crossing within 20 to 60 seconds after the activation of the devices." Mich. Comp. Laws Ann. §462.391(3). Other states have enacted similar legislation.

These efforts by states to protect motorists through legislation, taken in conjunction with the federal regulatory scheme, has created a crazy quilt of conflicting state and federal regulations that has caused more confusion than anything else. This is a situation that cries out for the federal solution intended by Congress in these regulations.

6. This Court's Decision In CSX Transportation v. Easterwood

This Court's most recent examination of the duties created by the federal regulatory scheme to reduce train/car collisions is contained in CSX Transportation v. Easterwood, 507 U.S. 658, 113 S.Ct. 1732, 123 L.Ed. 2d 387 (1993). That case involved a state tort claim based on excessive speed, plus an allegation that the railroad had failed to provide adequate warning devices at the grade crossing where the plaintiff's decedent was killed. The specific issue before the Court was whether causes of action based on common law negligence standards are preempted by the Federal Railroad Safety Act, 45 U.S.C. §434. In its unanimous decision, Easterwood made it clear that, where the Secretary of Transportation has issued applicable regulations, state and private decision-making regarding the railroad activity in question is preempted.

Because many courts, as occurred below, have erroneously assumed that the federal mandate to provide an adequate warning to motorists through an "active" warning system is met simply because the signal is "activated," the true intent of these regulations has generally eluded careful scrutiny by the courts. As a result, courts have been slow to appreciate how the congressional intent, expressed in these regulations, is thoroughly vitiated by extended activations. Indeed, the issue of the adequacy of warning systems is often

disposed of on summary judgment, with the court typically assuming that, in the absence of a mechanical malfunction, the warning device was operating properly and that the plaintiff's contributory negligence was the sole proximate cause of the collision. Even where the plaintiff escapes summary judgment, as in the instant case, the question of whether the system provided the plaintiff with an adequate warning is left to the jury to decide, with little or no specific guidance as to how automatic systems are designed to provide an adequate warning that a train is approaching.

These approaches tragically undercut the essence of the federal regulatory scheme, and, as a practical matter, enshrine a hodge-podge of conflicting rules in an area that Congress obviously intended to be the subject of a uniform national protocol. In ruling that the Easterwood plaintiff could not, consistent with the Supremacy Clause, invoke the local safety hazard exception as a justification to impose a state excessive speed limit, this Court recognized that a properly invoked "local hazard" standard must necessarily encompass more than the unique facts that are perforce present in every case. Any other rule would, in fact, "completely deprive the Secretary of the power to preempt state common law, a power conferred by §434." Easterwood, 507 U.S. at 404.

The same unacceptable result occurs where courts equate "activation" with "active" in defining the duty of railroads to provide motorists with an active warning of danger. Since, under this view of the federal regulations, warning systems that cannot actively warn are nonetheless deemed to meet the substantive federal criteria, the courts cannot, consistent with the Federal Railroad Safety Act and Easterwood, require substitute warning measures, except as a case-by-case expedient under the local safety hazard exception. The resulting quagmire is no less offensive than

the improper intrusion of the local speed limit standards disallowed in Easterwood. The case for federal preemption, in fact, is far more compelling here since, unlike the plaintiff in Easterwood, Jones is not seeking the application of an additional or stricter standard than that provided by federal law but, rather, is merely seeking enforcement of a clearly intended federal standard. Rather than invoking a local hazard as a basis for applying Ohio law, therefore, the trial court should simply have held Conrail to the standard imposed by federal law.

7. The FRA's Response to the Problem of Extended Activations

Not long after this Court's decision in Easterwood, the FRA responded to the known danger posed by extended activations by requiring that railroads take measures to warn motorists when the normal functioning of the system is interfered with. The linchpin of these regulations is 49 C.F.R. §234.225, which provides as follows:

> A highway-rail grade warning system shall be maintained to activate in accordance with the design of the warning system, but in no event shall it provide less than 20 seconds warning time for the normal operation of through trains before the grade crossing is occupied by rail traffic. (Emphasis added). (App. AA at p. 184a).

As the foregoing discussion shows, this regulation simply codifies a duty implicit in previously promulgated regulations that define an "adequate warning" to motorists at crossings, equipped with federally funded automatic warning devices, as a signal that "displays to motorists a positive warning of the

approach or presence of a train." 23 C.F.R. §646.214(b)(3)(i) and 23 C.F.R. §646.204(j) (App. Z, p.174a-175a) discussed at supra 11-13. The question then becomes: What do these regulations require when a railroad stops a train near a crossing, thereby making it impossible for the automatic devices "to activate in accordance with the design of the warning system" if another train approaches?

8. Duty to Use Alternate Measures

In response to the danger posed by extended activations, the FRA promulgated rules mandating the use of specific, alternate safety measures where an extended activation occurs under circumstances where it is unlikely that a railroad employee will be present and able to take alternate measures. Where an extended activation occurs because of a mechanical malfunction, for example, the regulations provide that, upon receipt by the railroad of a "credible report" of either a false activation or warning system malfunction, the railroad must "provide for alternate means of actively warning highway users of approaching trains." Under these conditions, trains may not proceed through the crossing at a speed greater than 15 mph, unless there is either an appropriately equipped flagger providing warning for either direction of highway traffic, or if there is not at least one uniformed law enforcement officer providing warning. 49 C.F.R. §234.107 (App. AA at p.181a).

On the other hand, where an extended activation is triggered by a railroad's own operations or activities, the FRA has chosen not to prescribe specific, alternate measures because, as the commentary accompanying the regulations shows, it simply assumed that railroads have established protocols to deal with such foreseeable conditions. Hence, with regard to railroad-generated activations, railroads are

simply directed to take alternate measures as follows:

> Interference with normal functioning of system
>
> (a) The normal functioning of any system shall not be interfered with in testing or otherwise without first taking measures to provide for safety of highway traffic that depends on normal functioning of such system.
>
> (b) Interference includes, but is not limited to:
>
> (1) Trains, locomotives or other railroad equipment standing within the system's approach circuit, other than normal train movements or switching operations, where the warning system is not designed to accommodate those activities. 49 C.F.R. §234.209 (Emphasis added) (App. AA, p.184a).

The regulations and the accompanying commentary leave no doubt that this regulatory scheme presupposes that the provisions requiring railroads to provide motorists with an "active warning" that the arrival of a train is imminent, will be interpreted as requiring the use of alternate measures for the safety of motorists when a train stops near a main line crossing. By requiring the use of alternate measures, except where an extended activation is caused by a normal train movement or switching operation, the FRA obviously intended to require alternate warning measures, except in circumstances where their use would not be practicable. Thus, the FRA noted:

> Railroads cannot operate without conducting

> switching operations in the approaches of highway rail crossings. This is a normal part of railroad operations and there is no available technology which would completely eliminate the warning system activations which result from these operations . . . We agree that there is no realistic means to prevent this from occurring at all locations.

59 Fed. Reg. 50,096 (1994). (Emphasis added) (App. Y, p.168a).

The FRA made the same point by citing several internal railroad rules demonstrating that the railroad industry recognizes that extended activations must be avoided, unless activation occurs under circumstances where there is no alternative. Hence, the FRA commented:

> Rule 103(D) of the General Code of Operating Rules provides that `automatic crossing signals must not be activated unnecessarily by open switch or permitting equipment to stand within the control circuit.' Similarly, NORAC Rule 138(b) provides that to . . . avoid unnecessary operation of automatic highway crossing protection . . . [e]ngines or cars must not be allowed to stand longer than necessary."

59 Fed. Reg. 50,096 (1994). (Emphasis added) (App. Y, p. 168a).

The foregoing commentary shows that the FRA intended by these latter regulations to accomplish two things: First, it reaffirmed the duty of railroads, implicit in earlier regulations, to use alternate safety measures when automatic

warning devices are rendered useless by railroad operations under circumstances in which the agency assumed that railroads have existing procedures to provide for the safety of highway users; and, second, the agency filled a gap in the regulatory scheme by prescribing specific safety measures when an extended activation is caused by conditions, such as false activations, not generally within the purview of existing operating or safety rules. Any other reading of the regulations would lead to the absurd conclusion that the agency intends railroads to use alternate safety measures only when an extended activation is caused by an event not under railroad control, but has given railroads a license to do nothing, as in the instant case, when the railroad has advance knowledge that an extended activation will be caused as a regular part of its operations and has every opportunity to guard against the possibility of a train/car collision.

9. Conrail's Interpretation of the Federal Regulations

Conrail has interpreted the foregoing regulations as an affirmative grant of federal immunity that allows it to stop trains near crossings without taking any steps to avoid a train/car collision. Conrail's brief in the appellate court makes its position unequivocally clear:

> On January 1, 1995, the FRA promulgated regulations defining the responsibilities of railroads at crossings where the signal systems are activated by standing equipment . . . The FRA determined that railroads are not required to provide alternate warnings when signal systems are activated by standing equipment that is engaged in normal train movements . . . Since the FRA has covered the subject of the railroads' duty

> to provide alternate warnings at crossings where standing trains have activated the system in the course of normal operations, this Court, applying Ohio common law, cannot impose a different duty on railroads under those circumstances.

Conrail's Brief, App. GG, p.202a.

The foregoing argument of Conrail shows, as nothing else could, why a writ should be granted in the instant case. The tragic fact of the matter is that railroads are exploiting the fact that the FRA has forborne prescribing specific measures that railroads must take when the normal operation of warning devices is interfered with by a train that stops near a crossing. There are several reasons this misuse of the regulations is so unconscionable that it needs to be remedied by this Court, and the sooner the better.

First, the regulations forbid railroads to operate trains over a grade crossing at speeds greater than 15 mph without the presence of a flagger or uniformed officer when a railroad receives a credible report that gate arms are down due to a false activation. False activations, however, are rare compared to the common practice of stopping trains near grade crossings.

Second, in the case of a false activation, there is no train present to either obstruct or distract the ability of motorists to detect the presence of a train approaching on an adjacent track. In other words, false activations are inherently less dangerous than the practice of stopping trains near main line crossings.

Third, when gates are activated by a train that stops near a crossing, the railroad company is immediately on

notice that an extended activation is occurring and is in a position to promptly take measures to prevent a crash. The fact that Conrail does not train its employees to do what these regulations require makes it clear that, unless and until this Court intervenes, Conrail will continue to play "railroad roulette" with the lives and safety of highway users.

Finally, these regulations implicitly show how easy it would have been for Conrail to have prevented the train/car collision that took the life of Scott Jones, a devoted father, husband, and pillar of his community. The evidence showed that this tragedy could easily have been prevented by (1) placing a flagger at the crossing while another train was approaching; (2) advising the moving train by radio of the danger and directing it to reduce its speed to a safe level as it approached the crossing; or (3) blocking the crossing with one of the engines from the stopped train during periods of danger to motorists. As the testimony in the Jones trial showed, any one of these measures can be employed at no cost to the railroad. As a consequence, there was simply no moral or economic justification for not using one of these measures on the evening that Scott Jones met his death.

In the final analysis, the most reprehensible aspect of this practice is that railroads know with certainty that motorists will be enticed to proceed during an extended activation of the warning system, under circumstances in which the railroad alone knows when the arrival of a train is imminent and has at its disposal all the means necessary to prevent a crash at no cost to itself. The regulatory framework necessary to stop the carnage that is being caused by this unconscionable practice is already in place. All that is needed is a strong pronouncement from this Court that there is a critical distinction between the mechanical and warning functions of automatic warning devices, and that when a train

stopped near a crossing interferes with the system's ability to actively warn, railroad companies have a duty under federal law to take alternate measures to protect against the possibility of a train/car collision.

CONCLUSION

The Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

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Date: July 3, 1998

APPENDIX

APPENDIX A

96-3828

FILED
FEB 6, 1998
LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REBECCA A. JONES, EXECUTRIX OF THE ESTATE OF SCOTT R. JONES, DECEASED, *Plaintiff-Appellant*,	)	
v.	)	**ORDER**
CONSOLIDATED RAIL CORPORATION, *Defendant-Appellee*.	)	

BEFORE: **NELSON**, **BOGGS**, and **SILER**, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the

original panel members but also to all other active* judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for reheating has been referred to the original panel.

The panel has further reviewed the petition for reheating and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

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* Judge Clay recused himself from participation in this ruling.

APPENDIX B

FILED
DEC 18 1997
LEONARD GREEN, Clerk

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 96-3828

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REBECCA A. JONES, Executrix of the Estate of SCOTT R. JONES, Deceased, *Plaintiff-Appellant*,	)	
v.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN OF OHIO
CONSOLIDATED RAIL CORPORATION, *Defendant-Appellee*.	)	

Before: **NELSON**, **BOGGS**, and **SILER**, Circuit Judges.

No. 96-3828
Jones v. Consolidated Rail Corporation

PER CURIAM. Plaintiff, Rebecca Jones, executrix of the estate of Scott Jones, filed this appeal from a judgment in favor of defendant, Consolidated Rail Corporation ("Conrail"), and a denial of a motion for a new trial and for certification of a question of law to the Supreme Court of Ohio in this diversity action for wrongful death. ruling of the district court. For the reasons set forth below, we **AFFIRM** the ruling of the district court.

I.

On the evening of February 7, 1994, the car of plaintiff's decedent, Scott Jones, was struck by a Conrail train at the Back Orrville crossing in Orrville, Ohio. Jones died shortly after the accident as a result of injuries sustained.

Scott Jones had driven his car around the downed gates at the crossing, allegedly having waited ten or more minutes from the initial activation of the gates. An oncoming train ("train 1") had triggered the gates and warning lights, but had not passed the crossing Rather, train 1 came to a stop in full view of the traffic accumulating at the crossing. The train stopped in anticipation of another train ("train 2") arriving at the crossing from the opposite direction. Because the track narrowed to a single track from two in the area immediately around the crossing, and because two trains heading in opposite directions obviously cannot occupy a single track, Conrail had instructed train 1 to wait for train 2 to pass Back Orrville before proceeding. There is no dispute that the headlights and "ditch lights" on train 2 were in operation at the time it reached the crossing, and that the conductor blew the horn forty seconds before reaching the crossing.

Jones alleged that this practice of having one train trigger the warning devices at the crossing but waiting for another train heading in the opposite direction to pass had become a common occurrence at the Back Orrville crossing since December 1992, when Conrail closed a length of the double track, leaving only one track open at Back Orrville. Jones claimed that as a result of this practice, the warning devices at Back Orrville had the "crying wolf" effect -- motorists no longer perceived the downed gates and flashing lights as an augury of the imminent passage of a train.

After suit was filed, the court granted partial summary judgment in favor of Conrail on the punitive damages issue. At trial, the court found Jones negligent as a matter of law for disregarding the warning device and the jury found no negligence by Conrail.

Jones then filed a motion for new trial and a motion to certify questions to the Ohio Supreme Court. These post-trial motions rested on legal theories Jones had not advanced at trial, but rather ones which, according to Jones, "both parties have unwittingly overlooked . . . ." Jones urged that Conrail should be deemed negligent *per se* because the warning system at the Back Orrville crossing was not "functional," although mechanically operational. Jones further sought certification of this issue, as well as questions as to whether Conrail should be held strictly liable, whether the court's instruction regarding Jones's negligence was proper, and whether Conrail's conduct exhibited a "conscious disregard for the rights and safety of others," to the Ohio Supreme Court. The district court denied these motions.

Jones then filed this appeal, arguing that: (1) Conrail's failure to maintain an "active" warning system at the Back Orrville crossing was negligence as a matter of law; (2) Conrail breached its duty to exercise ordinary care to protect the public safety; (3) Jones was *not per se* negligent in driving around the downed gates at the crossing; (4) public policy dictates that Conrail be held strictly liable for "disabling" an active warning system by creating the "crying wolf' effect; and (5) the district court should have submitted the issue of punitive damages to the jury.

II.

We note as a threshold matter that Jones failed to argue her *per se* negligence theory and her strict liability theory before the entry of judgment in Conrail's favor. This court is not bound to address issues a party puts forth for the first time on appeal. *Foster v. Barilow,* 6 F.3d 405,407 (6th Cir. 1993). An appellate court should reach newly-advanced arguments only where the proper resolution is beyond any doubt, or where "injustice might otherwise result." *Singleton v. Wulff,* 428 U.S. 106, 121 (1976). In *Foster,* this court indicated that review of matters not argued before the trial court is proper if to reach the issue would "serve[] an over-arching purpose beyond that of arriving at the correct result in an individual case." *Foster,* 6 F.3d at 408 (citation omitted).

Jones claims broadly that injustice would result if the court does not grant the relief she seeks, but provides no apparent explanation that would overcome *Foster's* "individual case" limitation. We therefore decline to address

Jones's *per se* negligence theory, as well as her strict liability theory.

Jones further assigns as error the district court's failure to direct a verdict as to Conrail's negligence on the basis of an alleged breach of Conrail's duty to "exercise ordinary care to protect public safety." Under *Powers v. Bayliner Marine Corp.*, 83 F.3d 789, 797 (6th Cir.), *cert. denied*, 117 S.Ct. 481 (1996), this court will look at all available evidence in the light most favorable to the non-moving party to determine whether a reasonable finder of fact could find against the moving party when reviewing denials of directed verdicts.

The district court did not err in failing to direct a verdict on this point. There is sufficient evidence to support a jury verdict finding no breach of duty. The record indicates that the train that struck Jones's vehicle had its warning lights and headlights operating as it approached the crossing. Further, the train blew its horn for forty seconds prior to the collision. Finally, there is no dispute that the warning device at the crossing was activated. A jury could reasonably conclude on the basis of these facts that Conrail did not breach its duty under *Matkovich v. Penn Central Transportation Co.*, 431 N.E.2d 652 (Ohio 1982).

Because the district court did not err in submitting the question of Conrail's negligence to the jury, and the jury reasonably concluded that Conrail was not negligent, we need not reach Jones's arguments concerning comparative negligence and punitive damages.

AFFIRMED.

APPENDIX C

FILED
JULY 3, 1996
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO, AKRON

DOWD, J. –

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Rebecca A. Jones, *Plaintiff*,	)	
	)	Case No.5:94cv2021
v.	)	
	)	**MEMORANDUM**
Consolidated Rail Corporation, *Defendant*.	)	**OPINION**

I. Introduction.

This wrongful death case involving the death of Scott Jones on the defendant's railroad crossing at the back Orrville-Wooster Road several miles west of Orrville ended in the defendant's favor when the jury answered an interrogatory to the effect that the defendant was not negligent when its westbound train collided with the vehicle of Mr. Jones when he was attempting to drive across the crossing

while the signal gates at the crossing were activated.

The plaintiff has moved for a new trial (Docket # 100) and, in the alternative, has moved the court to certify several questions of law to the Ohio Supreme Court. (Docket #102)

The plaintiff's motions are predicated on the proposition that the defendant was negligent as a matter of law and that the court erred in not directing a verdict on the defendant's negligence.[1] The plaintiff's proposition that the defendant was negligent as a matter of law is anchored in the undisputed fact that the signal gates and flashers that protected the crossing had been activated at least 10 minutes earlier when another of the defendant's trains headed in the opposite direction had activated the signal system for the crossing. The signal system was not deactivated when that train came to a complete stop prior to entering the crossing but remained in full view of the motoring public which then proceeded to drive over the crossing notwithstanding the fact that the signal system continued to function with the gates down and the

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[1] The court directed a verdict for the defendant on the issue of the plaintiff's negligence and found that the plaintiff's decedent Scott Jones was negligent when he drove his vehicle around the crossing gales in the down position and proceeded on to the tracks where his car was struck by the oncoming westbound train. The court bifurcated the jury's deliberation into issues of liability prior to damage issues. The jury answered the first interrogatory in defendant's favor by finding that the defendant was not negligent. Had the jury found the defendant to be negligent and its negligence to have been a proximate cause of the fatality, then the jury would have had to allocate the percentage of negligence between the plaintiff and the defendant.

flashers operating. As a cõnsequence of this fact, the plaintiff argues that the signal system, including the gates in the down position and the flashing lights, constituted a passive warning system such as cross bucks.[2]

Counsel for the plaintiff presents a comprehensive and compelling argument in support of his motion when the competing interests of the safety of the motoring public and the complexities of the operation of a railroad are considered.

The court has three choices: grant the motion for a new trial, certify the questions submitted by the plaintiff to the Ohio Supreme Court[3] or deny the motion and allow the Sixth

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[2] Unrebutted testimony presented in the case indicated that the warning system is designed to have the gates guarding the crossing begin to lower after the flashing lights start and at a time some seconds before the train activating the lowering of the gates reaches the crossing. Consequently, when the gates remain in the down position for a significant passage of time, such as in this case, the warning system loses its impact upon the motoring public which has been conditioned to expect the arrival of the train within a short period of time after the flashers and gates are activated.

[3] The plaintiff has requested that the five following questions be certified to the Ohio Supreme Court:

Question No. 1

> When an automatic warning system is unable to provide a positive warning signal 'to motorists at a grade crossing because it has been deactivated by a standing train, does a railroad have an affirmative duty to use available measures to warn motorists when a train is approaching the crossing?

Circuit to consider plaintiff's arguments. After considerable

Question No. 2

If the answer to Question No. 1 is in the affirmative, does failure of a railroad company to use available measures to warn motorists that a train is approaching constitute negligence as a matter of law?

Question No. 3

Is it negligence as a matter of law for a motorist to proceed around a lowered gate at a railroad grade crossing in circumstances where a reasonable person would conclude that the automatic warning system is incapable of providing a positive signal that a train is approaching?

Question No. 4

Should a railroad company be held strictly liable when, after an automatic warning system at a grade crossing is deactivated by a stopped train, no available measures are taken to warn motorists of the immediate approach of a train?

Question No. 5

When a railroad has actual knowledge that the warning system at a grade crossing is incapable of providing motorists with a positive signal indicating the immediate approach of a train, does the failure of a railroad company to use available measures to actively warn motorists that a train is approaching create a jury issue as to whether such failure constitutes conscious disregard for the rights and safety of others that has a great probability of causing substantial harm?

thought, the court is of the view that an appeal on this well tried case presents the best opportunity for a definitive decision on the issue raised by the plaintiff's motion for a new trial, or in the alternative, for a certification of questions to the Ohio Supreme Court.

In that context, the court **DENIES** the plaintiff's motions for a new trial and for a certification to the Ohio Supreme Court because it remains of the view that the plaintiff's evidence as to defendant's alleged negligence raised a question of fact for the jury rather than a question of law for the court.

IT IS SO ORDERED.

/s/_____
David D. Dowd, Jr.
U.S. District Judge

APPENDIX D

IN THE UNITED SATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED JULY 25, 1996
CLERK OF DISTRICT COURT
NORTHERN DISTRICT OF OHIO
AKRON

REBECCA A. JONES, EXECUTRIX OF THE ESTATE OF SCOTT R. JONES, DECEASED, *Plaintiff*,	)	**NOTICE OF APPEAL**
v.	)	
CONSOLIDATED RAIL CORPORATION, *Defendant*.	)	

Notice is hereby given that Rebecca A. Jones, Executrix of the Estate of Scott R. Jones, Deceased, plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the Judgment Entry dated May 8, 1996 and the Memorandum Opinion and Judgment Entry dated July 3, 1996.

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Attorneys for Plaintiff

Certification

This is to certify that a copy of the foregoing Notice of Appeal was this 24 day of July, 1996 forwarded by First Class Mail to Douglas Godshall and Thomas R. Himmelspach of Vogelgesang, Howes, Lindamood & Brunn, 400 Tuscarawas St., West, Suite 200, Canton, OH 44701, Attorneys for Defendant.

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Attorneys for Plaintiff

APPENDIX E

FILED
MAY 8, 1996
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO, AKRON

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Rebecca A. Jones, *Plaintiff*,	)	
	)	Case No.5:94cv2021
v.	)	
	)	**JUDGMENT**
Consolidated Rail Corporation, *Defendant*.	)	**ENTRY**

The above-captioned case was tried to a jury. The jury was given several Interrogatories. Following deliberations, the jury answered Interrogatory No. 1, finding that defendant Consolidated Rail Corporation was not negligent. Accordingly, IT IS HEREBY ORDERED, ADJUDGED and DECREED that judgment is entered in favor of defendant Consolidated Rail Corporation and against plaintiff Rebecca A. Jones, Executrix.

Each party shall bear its own costs. Case closed.

/s/_____
David D. Dowd, Jr.
U.S. District Judge

APPENDIX F

FILED
95 NOV 3
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
AKRON

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

REBECCA A. JONES, EXECUTRIX OF THE ESTATE OF SCOTT R. JONES, DECEASED, *Plaintiff*,	) **MEMORANDUM**) **OPINION AND**) **ORDER**
v.	
CONSOLIDATED RAIL CORPORATION, *Defendant*.	

Before the Court are cross motions for summary judgment (Docket Nos. 35 and 37) with supporting and opposing briefs. The Court conducted a hearing on

November 2, 1995. For the reasons and to the extent discussed below, the plaintiff's motion is denied and the defendant's motion is granted in part and denied in part.

I. FACTUAL BACKGROUND

This case arises out of a car/train accident at the Back Orrville Road grade crossing, near Orrville, Ohio. On February 7, 1994, at approximately 6:00 p.m., plaintiff's husband, Scott Jones ("plaintiff's decedent"), then age 39, was heading west on Back Orrville Road, also known as CR 23, a road which intersects defendant Conrail's Ft. Wayne line at railroad mile post 126.55. The roadway runs east to west and the train track runs northwest to southeast. The crossing is located within a 14-mile stretch of double track on either side of which the track narrows to a single track. As a result, whenever two trains are proceeding in opposite directions, the dispatcher will direct one of them to stop on the double-track section until the other train passes. This was the situation on the evening of the accident.

As plaintiff's decedent approached the crossing, the automatic gates were down and the lights were flashing, activated by a train, the INPI-7,[1] which had been signaled to stop on track 1. The train had stopped for two reasons: (1) to cut loose three locomotives from the rear of the train, and (2) to allow a train coming from the other direction on track 2 to pass through. The stopped train, about 500 feet from the crossing, could easily be seen by the persons driving vehicles

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[1] "INPI" designates that the train was bound to Pittsburgh from Indianapolis.

westbound on CR 23.

The engineer of the INPI-7 was John Landis and the conductor was Joseph Russell, both of whom witnessed the accident. As their train slowed to a stop, Landis and Russell observed that the Friday evening rush hour traffic, ignoring the warning system, was proceeding around the gates and over the crossing.[2] A minute or two after their train had stopped, both Landis and Russell saw a train approaching on the other track. This train was operated by Curtis North. The locomotive event recorder from North's train shows that it was traveling at a speed of 56 m.p.h., within the allowable track speed of 60 m.p.h. North testified at his deposition that he was sounding the train's horn as he approached the crossing. North's train was also equipped with "ditch lights," which flashed alternately whenever the horn was sounded.

As the INPI-7 rolled to a stop, Russell put on his coat and boots, planning to go out to flag the traffic for the oncoming train.[3] As he headed out the locomotive door, both

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[2] Actually, they observed one car stopped and the other vehicles going around that stopped car and over the tracks. The driver of the stopped car testified that several cars went around her and about seven cars came around the gates from the opposite direction. Just about the time this driver decided not to wait any longer, plaintiff's decedent pulled around her and proceeded over the tracks.

[3] The Conrail crewmen testified at their depositions, however, that they were not required to go out to flag a crossing unless the automatic warning devices were malfunctioning; in fact, they stated that for safety reasons Conrail actually discouraged its

he and Landis observed a blue van filled with children move slowly onto the crossing and into the path of the oncoming train. Plaintiff's decedent was in a vehicle immediately following the van. He, too, was crossing the tracks. North observed the same thing from his moving train. The van just cleared the track as North's train came to the crossing. The train hit plaintiff's decedent's car broadside and carried it approximately 1441 feet beyond the crossing. Scott Jones died about one hour later at Dunlap Memorial Hospital.

II. SUMMARY JUDGMENT STANDARD

It is well established that when considering a motion for summary judgment pursuant to Rule 56 of the Federal Rules of civil Procedure, "the inferences to be drawn from the underlying facts contained in [affidavits, pleadings, depositions, answers to interrogatories, and admissions] must be viewed in the light most favorable to the party opposing the motion." U.S. v. Diebold, 369 U.S. 654, 655 (1962); U.S. v. Hodges X-Ray, Inc., 759 F.2d 557 (6th Cir. 1985); Tee-Pak, Inc. v. St. Regis Paper co., 491 F.2d 1193 (6th Cir. 1974); Bohn Aluminum & Brass Corp. v. Storm King Corp., 303 F.2d 425 (6th Cir. 1962). However, the non-moving party bears the responsibility to demonstrate that summary judgment is inappropriate under Rule 56(E). The "adverse party may not rest upon the mere allegations or denials of [his] pleadings, but [his] response, by affidavits or otherwise. . ., must set forth specific facts showing there is a genuine issue for trail. If [he] does not so respond, summary

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employees from directing traffic. According to Landis, Russell was going out because he was "conscientious."

judgment, if appropriate, shall be entered against [him]." Fed. R.Civ.P.56(e).

A court may grant summary judgment only if there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R.Civ. P.56(c). "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). "[T]here is no issue for trail unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. (citing Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 288-89 (1968)). Therefore, "[i]f the evidence is merely colorable..., or is not significantly probative, summary judgment may be granted." Id. at 249-50 (citing Dombrowski v. Eastland, 387 U.S. 82 (1967) (per curiam); First National Bank of Arizona v. Cities Service Co., 391 U.S. at 290)). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Street v. J.C. Bradford & Co., 886 F.2d 1472, 1477 (6th Cir. 1989) (quoting Anderson v. Liberty Lobby, 477 U.S. at 252). Moreover, summary judgment is appropriate when the non-moving party "has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

In sum, "[t]he inquiry performed is the threshold inquiry of determining whether there is the need for a trial -- whether, in other words, there are any genuine factual issues

that properly can be resolved only by a finder of fact because they may be reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, 477 U.S. at 250.

III. DISCUSSION

A. The Parties' Positions

Plaintiff's position is that Conrail intentionally failed to implement rules and policies, and to use readily available preventive measures, which would have insured that the subject grade crossing was protected in circumstances such as exist in this case, namely, where Conrail knows that highway users may be, and frequently are, enticed into crossing tracks (e.g., in a multiple track setting where the warning system appears to have been activated by a stopped train). Plaintiff argues that Conrail exhibited conscious disregard for the rights and safety of others in the face of a great probability of substantial injury and death. Plaintiff's motion seeks summary judgment on the issue of Conrail's liability.

Defendant takes the view that it is entitled to summary judgment on plaintiff's entire complaint because of what it characterizes as the "willful and wanton conduct" of plaintiff's decedent in going around the gates. Conrail argues that the decedent acted with reckless disregard for his own safety, was fatally injured as a result of that reckless disregard, and cannot now seek damages from the defendant for injuries that arose from that reckless conduct. Defendant argues that plaintiff's decedent's reckless and unlawful conduct was the sole proximate cause of the accident which resulted in his injuries and death and that this action against Conrail is, therefore, barred. In the alternative, Conrail seeks dismissal

of plaintiff's punitive damages claim because there is no proof of actual malice on which to base such an award.

B. Analysis

The Court of Appeals for Hamilton County, Ohio set forth the analysis required in this case:

> "Liability for negligence is predicated upon injury caused by the failure to discharge a duty owed to the injured party." Deeds v. Am. Security (1987), 390 Ohio App.3d 31, 528 N.E.2d 1308. A cause of action in negligence has four elements: (1) duty, (2) breach of duty, (3) proximate cause, and (4) injury resulting. Menifee v. Welding Products, Inc. (1984), 15 Ohio St.3d 75, 15 OBR 179, 472 N.E.2d 707. "Resolution of the question whether a certain party's negligence constituted the proximate cause of another's injury is [ordinarily] a question of fact." Powell v. Consol. Rail Corp. (1986), 31 Ohio App.3d 219, 221, 31 OBR 501, 503, 510 N.E.2d 818, 820. Using these principles, we examine the instant record to determine whether genuine issues of material fact remain.
>
> In the instant case, the appellants cite the extrahazardous nature of the crossing and claim that [the railroad] had a duty to install additional, more sophisticated warning devices in that area to inform motorists of an approaching train. . . .
>
> We begin our analysis with the proposition that both a motorist and a train owe each other a duty of

> care to avoid collision. Barger v. Chesapeake & Ohio Ry. Co. (1990), 70 Ohio App.3d 307, 590 N.E.2d 1369. A railroad has a duty of ordinary care to protect the safety of motorists. Matkovich v. Penn Cent. Transp. Co. (1982), 69 Ohio St.2d 210, 23 O.O.3d 224, 431 N.E.2d 652; Newton v. Consol. Rail Corp. (Aug. 5, 1992), Hamilton App. No. C-910441, unreported. The motorist's duty, on the other hand, has been codified in R.C. 4511.62[.] . . .
>
> Further, in Zuments v. Baltimore & Ohio R.R.Co. (1971), 27 Ohio St.2d 71, 72, 56 O.O.2d 40, 40, 271 N.E.2d 813, 814, the Supreme Court held that:
>
> "The driver of a motor vehicle about to pass over a railroad grade crossing on a public highway is required both to look and to listen for approaching trains and the looking and listening must be at such time and place and in such manner as to be effective for that purpose."
>
> The evidence set forth in the record clearly demonstrates that [appellant's decedent] did violate R.C. 4511.62 and was, therefore, negligent *per se*. Such negligence, however, does not automatically bar the appellant's claims. If there is also evidence that the appellee [railroad] was negligent, there may have been grounds for submitting the case to the jury. Barber, supra.

Glick v. Marler, 82 Ohio App.3d 752, 756-57, 613 N.E.2d 254 (1992), appeal dismissed, 66 Ohio St.3d 1434 (1993).

Conrail has a duty to act with reasonable care under the circumstances to protect members of the motoring public who encounter railroad grade crossings. What constitutes reasonable care under the circumstances is a question of fact.

In this case, although many facts are not in dispute, there is a question has to how much time had elapsed between the moment when the one train stopped and the other train crossed the intersection and hit plaintiff's decedent. The possible range based on the record is anywhere from "a few minutes" to at "at least ten minutes." If the time span was ten minutes, it becomes a question for the fact-finder whether, in view of the total circumstances, Conrail did enough to satisfy its duty. Among the other conditions, all undisputed, that make up the totality of the circumstances are: (1) the downed gates and flashing lights; (2) the lights on the front of the locomotive; (3) the locomotive horn blowing and its bell ringing; (4) the acute angle between the railroad tracks and the roadway: (4) the stopped train within view of the motorists; (5) the line of traffic moving across the tracks despite the activated warning system; and (6) the time of day -- dusk. The question for the jury is whether Conrail, under these particular circumstances, met its duty of care.

In view of this jury question, plaintiff is not entitled to summary judgment on the issue of defendant's negligence. Therefore, plaintiff's motion for summary judgment (Docket No. 35) is denied.

The defendant did not move for summary judgment on the issue of its liability, but argued in favor of such a ruling at the hearing. Given that there are facts in dispute, defendant is also not entitled to summary judgment on the issue of

liability.

It shall be for the jury to decide whether either or both of the parties were negligent and, if both were negligent, how the negligence should be apportioned.

Defendant's motion for summary judgment (Docket No. 37) that this action is barred because plaintiff's decedent's conduct was wanton and wilful is denied. However, the motion is granted to the extent that it seeks a ruling that the plaintiff is not entitled to punitive damages if defendant is found liable for negligence.

IV. CONCLUSION

For the reasons set forth above, plaintiff's motion for summary judgment on the issue of liability (Docket No. 35) is denied. Defendant's motion for summary judgment (Docket No. 37) is denied on the issue of wanton and wilful conduct on the part of the plaintiff's decedent; defendant's motion is granted on the issue of punitive damages.

In view of this resolution of the summary judgment motions, the Court shall by separate order schedule a status conference for the purpose of setting a trial date.

IT IS SO ORDERED.

David D. Dowd, Jr.
U.S. District Judge

APPENDIX G

FILED SEP 30, 1997
COURT OF APPEALS OF
ERIE COUNTY, OHIO

IN THE COURT OF APPEALS OF ERIE COUNTY
No. E-97-001

Darlene M. Wightman	)	
Admx. of the Estate	)	
of Michelle L. Wightman	)	
Deceased, et al.	)	
Appellees/Cross-Appellants,	)	
	)	**OPINION AND**
v.	)	**JUDGMENT ENTRY**
	)	
Consolidated Rail	)	
Corporation, et al.	)	
Appellants/Cross-Appellees.	)	

Thomas J. Murray and Mary O'Neill, for appellee/cross-appellant Darlene Wightman.

Harvey L. Frutkin and Kerin Lyn Kaminski, for appellee Michelle Wightman Charitable Foundation.

Ralph G. Wellington, Nancy Winkelman, Glenn A. Weiner, Philip E. Howes and Thomas R. Himmelspach, for appellant Consolidated Rail Corporation.

Court of Appeals, Erie County
E-97-001

SHERCK, J. This appeal and cross-appeal comes to us from an award of $15,000,000 in punitive damages against a railroad found culpable of "actual malice", following a train/automobile collision. Because we conclude that the trial court's evidentiary rulings were correct and the damages awarded not excessive, we affirm its decision. We similarly affirm the trial court on the issues raised by appellees/cross-appellants.

Shortly before midnight on February 18, 1989, a westbound freight train (designated SEEL 7) owned by appellant/cross-appellee ("appellant") Consolidated Rail Corporation, lost pressure in its air brakes near Remington Avenue, Sandusky, Ohio. This equipment failure caused the train to stop approximately two hundred feet east of the Remington Avenue road crossing. The presence of the train so near the crossing triggered the warning lights and gates at the crossing.

SEEL 7 was manned by a three-man crew--an engineer, conductor and brakeman. The engineer remained in the locomotive cab and communicated the train's problem by radio to a Toledo dispatcher. The conductor and brakeman began to "walk" the mile-long train for the purpose of finding and repairing the air leak.

In the meantime, traffic on Remington Avenue began to maneuver around the gates and over the two sets of tracks. Shortly before midnight, a Sandusky police office came upon the scene. The officer requested his dispatcher to advise the railroad of the situation. He also issued warnings to two or three drivers he observed go around the gates. The officer

then left the scene to stop another motorist.

At 12:05 a.m., sixteen-year-old Michelle Wightman, driving her mother's 1985 Ford, came upon the crossing and attempted to maneuver around the gate and cross the tracks. As she inched across the tracks, Michelle's car was struck by an eastbound fast freight train on the parallel track. Michelle and her passenger, sixteen-year-old Karrie Wieber, were killed.

Appellee/cross-appellant ("appellee"), Darlene M. Wightman, Michelle's mother, instituted a suit on behalf of herself and as the administrator of Michelle's estate. The suit contained two causes of action: a wrongful death claim and appellee's personal property claim arising from the destruction of her car. Both claims were Premised on appellant's negligence which appellee alleged constituted intentional, wanton and reckless misconduct. The suit sought compensatory and punitive damages.

In October 1990, the matter proceeded to jury trial. At trial, appellee's presentation focused on the factors contributing to the collision. Railroad safety expert Dr. William Berg testified that the cause of the accident was the combination of restricted visibility (due to SEEL 7's close proximity to the crossing) and the loss of "credibility" (due to the inordinately long activation of the railroad gates and flashing lights without the arrival of a train). Appellee argued that the railroad had near certain knowledge that under these circumstances someone would cross the tracks. At the same time, railroad employees knew that a fast freight was coming on the obscured track. With this knowledge, appellee contended, the railroad could have instituted any number of

simple, cost free measures which would have prevented the collision and the resulting death of two people. According to appellee, the railroad's failure to take any measure to prevent the collision constituted actual malice--a conscious disregard for the safety of persons in circumstances in which a great probability of substantial harm existed.

Appellant took the position that Michelle Wightman was herself negligent per se for violating a state law prohibiting crossing railroad tracks when warning signals are activated.

The jury returned a verdict for the plaintiff. In response to a series of interrogatories, the jury set damages on the wrongful death claim at $1,000,000, apportioned comparative negligence at sixty percent for appellant and forty percent for Michelle Wightman, but concluded that appellant was guilty of actual malice which was a proximate cause of the collision. The jury also found that appellant should be liable for punitive damages.

Following the verdict, the trial court, in Conformity with former R.C.§2315.21(C) (2), began bench proceedings on the punitive damages issue. However, in mid-November 1990, appellant filed an affidavit of prejudice against the trial judge which it followed with several motions seeking to set aside the verdict. The Supreme Court of Ohio rejected appellant's attempt to disqualify the trial judge. Nonetheless, it was not until late summer 1991 that the damages hearing was completed. More motions followed. Finally, the trial court rejected appellant's further attempts to set aside the jury's decision and, on February 11, 1992, entered judgment on the

verdict. The court awarded the compensatory damages, but refused to grant any punitive damages. The court did not rule on appellee's motion for post-verdict interest on the compensatory damages or her motion for attorney fees.

Pursuant to a trial court's certification that there was no just reason for delay, the February 11 judgment was appealed to us. We affirmed the jury's verdict, but on appellee's cross-appeal concluded that the trial court erred when it failed to award any punitive damages. We rejected on cross-appeal appellee's constitutional challenge to that portion of R.C. 2315.21, which reserved to the trial judge the consideration of the amount of punitive damages. The matter was then remanded to the trial court for consideration of punitive damages. Wightman v. Consolidated Rail Corp. (1994), 94 Ohio App.3d 389.

After remand, the Supreme Court declared R.C. 2315.21(C) (2), which reserved consideration of punitive damages to the trial judge, unconstitutional. Zoppo v. Homestead Ins. Co. (1994), 71 Ohio St.3d 552, syllabus. The result of that decision sets the unique procedural posture for the present appeal.

The combination of the Supreme Court's nullification of R.C. 2315.21(C) (2) and our remand to the trial court to set punitive damages meant the original jury would need to be reassembled or a new jury empaneled to determine the amount of punitive damages. Because of the extended period between the original trial and the remand, the second option was chosen.

Prior to trial, the court granted appellee's motions in limine barring reference to the prior trial judge's refusal to award punitive damages, the award of compensatory damages in the first trial, application of a federal railway administrative rule enacted after the accident and evidence of Michelle Wightman's alcohol consumption or allegations that appellee furnished alcoholic beverages to her daughter. The trial court also granted appellant's motion to exclude any reference to the fact that a portion of the award might go to a charitable foundation.[1] The court also limited discussion of other railroad crossing accidents unless such were "substantially similar" to the one at issue.

The matter was then retried before a second jury. Testimony at the second trial, to a great extent, mirrored that in the first. Dr. Berg again testified that the position of SEEL 7 near the crossing blocked the line of sight for any motorist looking for. westbound trains and triggered traffic control devices which became ineffective as time passed. Berg testified that of the thousands of railroad crossing accidents which he had studied, a large number occurred in

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[1] In the period between the remand and the punitive damages trial, the estate pledged a portion of any punitive damages received to appellee/cross-appellant Michelle Wightman Charitable Foundation. The foundation was permitted to join the proceeding as a party but the trial court granted a motion in limine denying any mention to the jury of the foundation or any assignment of proceeds. The foundation is an appellee/ cross-appellant in this appeal. For purposes of this appeal we shall reserve the appellation "appellee" to Darlene Wightman unless making specific reference to the foundation.

circumstances substantially similar to these. He also testified that it would have been relatively simple and cost free for the railroad to remedy this dangerous situation. According to Berg, the railroad could have insisted that the train crew flag the crossing, slowed the fast moving freight, or moved the engine of the stopped train across the crossing when it was known a fast freight train was due.

On submission, the jury returned a verdict awarding appellee $25,000,000 in punitive damages. Subsequent to the verdict, the trial court granted appellant a remittitur. Although specifically refusing to find the $25,000,000 award excessive, the court reduced the amount to $15,000,000; appellee accepted this reduction. The trial court also denied appellee's motion for attorney fees and post verdict interest on the compensatory damages award; the court further granted appellant relief from interest on the punitive award.

Appellant now brings this appeal setting forth the following three assignments of error:

> "I. The trial court violated Conrail's Due Process rights by prohibiting Conrail from introducing its evidence regarding the circumstances of the accident and allowing only plaintiff to introduce such evidence.
>
> "II. The trial court erred in admitting plaintiff's expert testimony because the expert did not base his opinions on personal knowledge or on the evidence admitted at trial and did not disclose the facts that supported his

opinions, in violation of Rules 703 and 705 of the Ohio Rules of Evidence.

"III. The trial court violated Conrail's rights under Ohio common law and the Due Process Clause of the United States Constitution by refusing to overturn or further remit the punitive damages award because that award even after remittitur, is grossly excessive in light of Conrail's conduct and is 6,250 times greater than the compensatory damages award."

Appellee Darlene Wightman cross-appeals raising the following four assignments of error:

"I. THE TRIAL COURT ERRED BY NOT MAKING ITS REMITTITUR EXPRESSLY CONDITIONAL ON ACCEPTANCE BY BOTH PARTIES AS AUTHORIZED BY THE SO-CALLED 'WISCONSIN RULE,' WHICH THIS COURT FOR THE PUBLIC GOOD SHOULD ADOPT AS THE LAW OF OHIO.

"II. THE TRIAL COURT ERRED BY GRANTING CONRAIL'S REQUEST FOR RELIEF FROM INTEREST ON THE PUNITIVE AWARD.

"III. IT WAS ERROR FOR THE TRIAL COURT TO DENY INTEREST ON THE

> COMPENSATORY AWARD TO THE WIGHTMAN ESTATE, COMPUTED FROM THE DATE OF THE LIABILITY VERDICT.
>
> "IV. THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR ATTORNEY FEES."

Appellee Michelle Wightman Charitable Foundation has filed a brief in support of Darlene Wightman's appeal and an 'independent cross-appeal in which it raises the following single assignment of error:

> "The Trial Court erred by remitting the jury's punitive damage award because the Trial Court specifically found that the jury award was not excessive."

I.

In its first assignment of error, appellant maintains that the trial court's decision to bar reference to certain matters rendered it defenseless. The court granted plaintiff's motion in limine to block reference to the fact that the first trial had resulted in a wrongful death award, but no punitive damages.. The court also prevented the introduction of evidence that appellee's decedent had consumed a small quantity of alcohol prior to the collision and expert testimony concerning the effects such alcohol might have had on a driver.

Relevant evidence is generally admissible, irrelevant evidence is not. Evid. R. 402. Relevant evidence is defined as

that evidence having a tendency to make the determination of a fact of consequence more or less probable than it would be without the evidence. Evid. R. 401. Even evidence which is relevant is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. Evid. R. 403(A). The decision of whether or not to admit evidence rests in the sound discretion of the court and will not be disturbed absent an abuse of that discretion. Huffman v. Hair Surgeons, Inc. (1985), 19 Ohio St.3d 83, 87. An "abuse of discretion" is more than an error of law or of judgment, the term connotes an attitude that is unreasonable, arbitrary or unconscionable. Berk v. Matthews (1990), 53 Ohio St.3d 161, 168-169.

When we initially reviewed this case, we affirmed the first jury's verdict in its entirety, including its' conclusion that' appellant's disregard-for the safety of others constituted "actual malice." Wightman v. Consolidated Rail Corp. (1994), at 408. We also noted that a finding Of actual malice negates any role that comparative or contributory negligence plays in reducing or defeating the recovery of damages. Id. at 407. The only issue to be decided on remand was the amount of punitive damages to which appellee would be entitled. Id. at 409. Consequently, the amount of compensatory damages awarded in the first trial and the fact that the first trial judge failed to award punitive damages were absolutely irrelevant to any issue of consequence in the punitive damages trial.

The presence of a small quantity of alcohol in the teenage driver's blood may have had some probative value in a comparative or contributory negligence setting. However, those issues were settled in the first trial. Even assuming

blood alcohol evidence was in any way relevant to the punitive damages issue, it was certainly not an abuse of discretion for the trial court to exclude such testimony pursuant to Evid. R. 403(A).

Accordingly, appellant's first assignment of error is found not well-taken.

II.

In its second assignment of error, appellant contends that the trial court erred in admitting the testimony of plaintiffs' expert, Dr. Berg. Specifically, appellant objects to Berg's statement that of the approximately one thousand vehicle-train collisions annually, a large number occurred in situations substantially similar to this one.

Again, decisions as to the admission of or exclusion of evidence are within the sound discretion of the court. Appellant's position is that Evid. R. 703 and Evid. R. 705 prohibit any expert opinion unless based on the expert's own specific observations or evidence admitted at trial. This position is specious in two respects. First, Dr. Berg's credentials reveal that he has a Ph.D. in civil engineering and has spent decades studying, among other things, rail crossing collisions. In addition, Berg testified that he personally investigated numerous vehicle-train collisions. If appellant needed more specifics than this, it was free to inquire on cross-examination. Second, Evid. R. 703 prohibits expert testimony based on unadmitted hearsay or unobserved data only with respect to the specific issues in the case at bar. According to Professor Giannelli,

> "In one sense, *** most expert witness testimony is based, in part, on hearsay. The extrajudicial statements of colleagues, textwriters, and teachers are all used by experts in forming opinions. See 2 Wigmore. Evidence § 665b (Chadbourn rev 1979). Rule 703 does not prohibit this use of hearsay information. This use of texts and lectures contributes to the expert's qualifications. Rule 703 is concerned only with the 'facts and data in the particular case.' Those facts must be admitted in evidence. According to the court in Bluebird Baking Co. v. McCarthy, 19 Abs 466, 470, 36 NE(2d) 801 (App, Franklin 1935), an expert's qualifications and knowledge 'may be based on personal experience or upon reading from standard works. It generally is based upon both. ***" Giannelli, Ohio Evidence Manual (1991), §703.05 at 117.

For Dr. Berg to testify to the specific reasons Michelle Wightman's car was struck by a train, the circumstances surrounding that collision must be admitted into evidence. However, for Dr. Berg to testify to a broad general pattern of collisions, many of which were substantially similar to the Wightman crash, no such foundation is required. Again, if appellant was not pleased with the expert's testimony it was free to cross-examine or present contrary opinion from its own experts.

Accordingly, appellant's second assignment of error

is found not well-taken.

III.

Appellant's remaining assignment of error concerns the amount of punitive damages awarded which appellant characterizes as being "grossly excessive." Noting that a wrongful death cannot form the basis for punitive damages, see, Rubeck v. Huffman (1978), 54 Ohio St.2d 20, appellant argues that the only foundation for the $15,000,000 award was the $2,400 value of appellee's car. This, appellant computes, is a ratio of six thousand two hundred fifty to one, substantially greater than the average ratio of punitives to damages in Ohio cases and even greater than the five hundred to one ratio found constitutionally offensive in BMW of North America, Inc. v. Gore (1996), 571 U.S.___, 134, L.Ed.2d 809, 116 S.Ct. 1589.

The trial court's detailed and perceptive analysis of this issue is contained in its order of December 5, 1996, in which it granted appellee's motion for remittitur. (Attached as Appendix A.) Although we reserve discussion of the trial court's ultimate decision to grant the remittitur until our consideration of appellee's-cross appeal, we otherwise approve and adopt the decision of the trial court (pages 8 through 19) on this issue as our own.

Accordingly, appellant's third assignment of error is not well-taken.

IV.

Appellee Darlene Wightman's first cross-assignment of error and appellee Wightman Foundation's sole assignment of error contest the trial court's grant of appellant's motion for remittitur, contending it could not have properly granted such a motion absent a finding that the award was excessive. Both of these parties agreed to accept the remittitur.

It has long been held that a judgment based on an agreement of the parties renders immaterial erroneous rulings of the court. Jackson v. Jackson (1865), 16 Ohio St. 163; Sanitary Commercial Services, Inc. v. Shank (1991), 57 Ohio St.3d 178, 181. More specifically, Ohio common law provides that a party who accepts a remittitur cannot change the remittitur even if the opposing party institutes an appeal. See Scioto Memorial Hosp. Assoc. v. Price Waterhouse (1996), 74 Ohio St.3d 474, 478, Iron Railroad Co. v. Mowery (1881), 36 Ohio St. 418, paragraph three of the syllabus.

Nevertheless, appellee urges us to adopt the "Wisconsin rule", which states that a defendant, who benefits from a remittitur and appeals, faces the risk of having the original verdict reinstated. Plesko v. Milwaukee (1963), 19 Wis.2d 210, 220-221 .While we may concurs with appellee's reasoning on this issue, we are bound to follow the rule of law set down by the Supreme Court of Ohio. Kruse v. State (1972), 31 Ohio St.2d 132, 148, Corrigan, J. concurring, overruled on other grounds (1981), 67 Ohio St.2d 31. Therefore, appellee's arguments are best directed to that court.

Accordingly, appellee Wightman's first cross-

assignment of error and appellee Wightman Foundation sole assignment of error are not well-taken.

V.

Appellee Darlene Wightman's remaining assignments of error concern the trial court's refusal to grant post-judgment interest on the punitive damage award, impose prejudgment interest on the wrongful death award for the nearly two year period between the verdict and the judgment on the verdict, and grant appellee reasonable attorney fees.

With respect to the denial of post-judgment interest on the punitive damages, the trial court's decision on this issue came as part of the calculations it employed in determining the remittitur. As discussed above, appellee accepted this remittitur and cannot now be heard to complain of its terms.

Accordingly, appellee Darlene Wightman's second cross-assignment of error is found not well-taken.

In her third cross-assignment of error, appellee Darlene Wightman seeks to meld common law prejudgment interest with the statute allowing for prejudgment interest when there is bad faith. As noted in Moskovitz v. Mt. Sinai Md. Ctr. (1994), 69 Ohio St.3d 638, 656-657, at common, law the factfinder was permitted to include in its tort award an amount sufficient to compensate a victim for interest on damages actually sustained in order to make the plaintiff whole. Id. citing Hogg v. Zanesville Canal & Mfg. Co. (1832), 5 Ohio 410, 424. Moreover,

> "'*** if reparation for the injury is delayed for a long time by the wrong-doer, the injured party can not be made whole unless the damages awarded "include compensation, in the nature of interest, for withholding the reparation which ought to have been promptly made.'" Id. quoting Lawrence Railroad Co. v. Cobb (1878), 35 Ohio St. 94, 98-99.

Statutory prejudgment interest is authorized by R.C. 1343.03(C) which permits interest to be awarded from the date a cause of action accrued if, following a post-verdict hearing, the court determines that a party against whom a verdict is returned failed to make a good faith effort to settle the case. The determination of whether there was a lack of good faith by a party is vested in the sound discretion of the court. Moskovitz at 658.

The question of whether common law prejudgment interest should be awarded appears to be an issue for submission to and resolution by the finder of fact. See Moskovitz at 656-657 and cases cited therein. No request for such a submission to either Wightman jury was made; therefore, no such consideration was undertaken. Appellee is consequently precluded from common law prejudgment interest.

Assuming for the sake of argument that the phrase "*** good faith effort to settle the case ***" used in R.C. 1343.03(C) may be construed to apply to dilatory tactics employed by a party between a verdict and the issuance of a judgment, this does not alter the fact that the trial court

refused to find bad faith. Viewing the totality of the circumstances, we cannot at this stage conclude that the trial court's determination was an abuse of discretion.

Concerning attorney fees, this again is an issue which rests in the sound discretion of the court. Digital and Analog Corp. v. Norton Supply Co. (1992), 63 Ohio St.3d 657, 664.

> "Although the general rule is that reasonable attorney fees may be awarded in an action where punitive damages have also been awarded, a trial court may decline to award any amount of attorney fees if the defendant upon whom such fees will be imposed successfully rebuts the presumption that reasonable fees should be awarded. Thus, a trial court may consider whether the punitive damages awarded are adequate both to compensate the plaintiff for his attorney fees and to fulfill the punitive and deterrent purpose of the exemplary damages awarded. If the court concludes that the punitive damages are sufficient to fulfill those purposes without the imposition of attorney fees, the court may decline to award such fees, even if a jury has determined that such fees should be awarded." Id. at 664-665 (Citations omitted.)

A determination by the trial court that a $15,000,000 punitive award provided a sufficient punitive and deterrent purpose would be within the court's discretion.

Accordingly, appellee Darlene Wightman's third and fourth cross-assignments of error are found not well-taken.

On consideration whereof, the court finds substantial justice has been done the parties complaining, and the judgment of the Erie County Court of Common Pleas is affirmed. It is ordered that appellant and appellee share equally the court costs of this appeal. [2]

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App. R. 4, amended 7/1/92.

/s/_____
Peter M. Handwork,
Judge

/s/_____
J. George M. Glasser,
Judge

/s/_____
J. James R. Sherck, J.
Judge
CONCUR.

---

[2] The parties have filed numerous motions following oral argument, all of which are, hereby, overruled.

APPENDIX H

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Rebecca A. Jones, Executrix of the Estate of Scott R. Jones, Deceased, *Plaintiff*,	)	
v.	)	Case No.5:94cv2021
Consolidated Rail Corporation, *Defendant*.	)	**JURY INSTRUCTIONS**

/

COURT'S INSTRUCTIONS TO THE JURY

Members of the Jury:

Now you have heard all of the evidence. Now it becomes my duty to give you the instructions of the Court concerning the law applicable to this case. After I conclude my instructions the lawyers will present their final arguments. If they wish, they may call your attention to any part of these

written instructions. Unless they do so, please put them aside and give the lawyers your undivided attention as they present their final arguments.

It is your duty as jurors to follow the law as I shall state it to you, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me. Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a decision upon any view of the law other than that given in the instructions of the Court, just as it would also be a violation of your sworn duty, as judges of the facts, to base a decision upon anything other than the evidence in the ease.

Nothing I say in these instructions is to be taken as any indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts, but rather yours.

Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors and to arrive at a decision by applying the same rules of law, as given in the instructions of the Court.

In deciding the facts of this case you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially

consider all of the evidence in the case, follow the law as stated by the Court, and reach a just decision regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, and holding the same or similar stations in life.

As stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice.

In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

So, while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may take deductions and reach conclusions which reason and common Sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate. You must determine this case on the evidence before you. You may not render a decision based upon sympathy, passion, prejudice or oratory.

As the sole judges of the facts, you must determine which of the witnesses you believe, what portion of their testimony you accept and what weight you attach to it. At times during the trial I may have sustained objections to questions asked without permitting the witness to answer or, where an answer had already been made, I may have instructed that it be stricken from the record and that you disregard it and dismiss it from your minds. You may not draw any inference from an unanswered question nor may you consider testimony which has been stricken in reaching your decision. The law requires that your decision be made solely upon the competent evidence before you. Such items as I exclude from your consideration will be excluded because they are not legally admissible.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to his testimony. In weighing the testimony of a witness you should consider his relationship to the plaintiff or to the defendant; his interest, if any, in the outcome of the case; his manner of testifying; his opportunity to observe or acquire knowledge concerning the facts about which he testified; his candor, fairness and intelligence; and the extent to which he has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

You are not required to accept testimony, even though the testimony is uncontradicted and the witness is not impeached. You may decide, because of the witness' beating and demeanor, or because of the inherent improbability of his testimony, or for other reasons sufficient to you, that such testimony is not worthy of belief. In determining what evidence you will accept you must make your own evaluation of the testimony given by each of the witnesses, and determine the degree or weight you choose to give to his testimony. The testimony of a witness may fail to conform to the facts as they occurred because he is intentionally telling a falsehood, because he did not accurately see or hear that about which he testifies, because his recollection of the event is faulty, or because he has not expressed himself clearly in giving his testimony. There is no magical formula by which one may evaluate testimony. You bring with you to this courtroom all of the experience and background of your lives.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

A witness may be discredited or "impeached" by contradictory evidence, by a showing that he testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence -- such as the testimony of an eyewitness. The other is indirect or circumstantial evidence -- the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as seem justified in the light of your experience.

Inferences are deductions or conclusions which reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.

Although the burden of proof is on the party who asserts the affirmative of an issue to prove his claim by a preponderance of the evidence in the case, this rule does not,

of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

In a civil action such as this, it is proper to find that a party has succeeded in carrying the burden of proof on an issue of fact if, after consideration of all the evidence in the case, the jurors believe that what is sought to be proved on that issue is more likely true than not true.

The burden is on the plaintiff in a civil action, such as this, to prove every essential element of her claim by a preponderance of the evidence. If the proof should fail to establish any essential element of the plaintiff's claim by a preponderance of the evidence in the case, the jury should find for defendant.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. Preponderance of the evidence means the greater weight of the evidence, but in a civil case such as this, does not require proof beyond a reasonable doubt. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true.

In determining whether any fact in issue has been proved by a preponderance of the evidence, the jury may consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them. If the proof should fail to establish any essential element of

plaintiff's claim by a preponderance of the evidence, the jury should find for the defendant.

EXPERT WITNESSES

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists for those called "expert witnesses." Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state their opinions as to relevant and material matters, in which they profess to be an expert, and may also state their reasons for the opinion.

You should consider each expert opinion received in evidence in this case, and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

Before you may accept and rely on the opinion of an expert witness, you must be able to determine from the evidence that his or her opinion is supported by reliable scientific tests, experience and/or studies. Without such support, an opinion is nothing more than conjecture or speculation, and you may not rely on such an opinion in reaching your verdict.

PLAINTIFF'S CLAIMS

The plaintiff, Rebecca Jones, brings a wrongful death

claim against Conrail based on a fatal accident involving her husband, Scott Jones, which occurred on February 7, 1994. The plaintiff brings this action on behalf of the beneficiaries of the estate of Scott Jones. Mrs. Jones claims that Conrail was negligent in the operation of its railroad. I will explain the legal meaning of "negligence" later.

Conrail denies the claims and further asserts that Mr. Jones himself was negligent and that his negligence caused the accident and his death. Conrail also claims that Mr. Jones was reckless and that this recklessness caused his death. Mrs. Jones denies that Scott Jones was negligent or reckless.

Certain facts have been stipulated to. I previously read these stipulated facts to you and gave you copies. These matters are not in dispute and you are to take them as true. There are other matters in dispute which are for you to decide. These instructions will assist you in your determinations.

INTRODUCTION TO NEGLIGENCE ANALYSIS

The plaintiff alleges that Conrail operated its railroad at the Back Orrville Road crossing in a negligent manner, causing Scott Jones' death. Conrail, on the other hand, asserts that Scott Jones was negligent and caused his own death. Conrail further asserts that Scott Jones' conduct was so reckless, so wanton and willful, that Conrail cannot be held liable.

In this situation, it must be decided: (1) whether Jones was negligent and whether that negligence contributed to or caused his death, (2) whether Conrail was negligent and

whether its negligence contributed to or caused his death and, (3) whether Mr. Jones' conduct was so reckless that Conrail cannot be liable even if it was negligent and its negligence proximately caused Mr. Jones' death.

With respect to number (1) above, I specifically instruct you that the evidence shows that Scott Jones, by disregarding the flashing lights and going around the downed gates at the Back Orrville Road crossing, was negligent. This does not automatically mean, however, that he caused his own death. You must decide whether Scott Jones' negligence was the proximate cause of his death. I will tell you shortly what is meant by "proximate cause."

With respect to number (2) above, you must decide whether Conrail was also negligent and, if so, whether that negligence was a proximate cause of Scott Jones' death.

With respect to number (3) above, I specifically instruct you that the evidence does not support a finding that Scott Jones was reckless by disregarding the flashing lights and going around the downed gates.

I will instruct you now as to the legal meanings of negligence and proximate cause.

NEGLIGENCE

Negligence is the failure to use ordinary care. Every person is required to use ordinary care to avoid injuring others. In this case, Conrail is a "person." Ordinary care is the care that a reasonably prudent person would use under the same or similar circumstances.

Ordinary care is not an absolute term. In deciding whether ordinary care was exercised, the conduct in question must be viewed in the light of all the surrounding circumstances, as shown by the evidence in the case. The amount of care increases in proportion to the danger that reasonably should be foreseen. The test for negligence, though, is still ordinary care under the circumstances.

In deciding whether ordinary care was used, you must consider whether Conrail ought to have foreseen under the circumstances that the natural and probable result of an act or failure to act would be some injury. The test for foreseeability is not whether Conrail should have foreseen the injury exactly as it happened. The test is whether under all the circumstances a reasonably prudent person would have anticipated that some injury was likely to result to someone or something from the act or failure to act.

If Conrail, by the use of ordinary care, should have foreseen some injury and should not have acted, or if it did act, should have taken precautions to avoid the foreseeable result, then the performance of the act or the failure to take such precautions is negligence.

PROXIMATE CAUSE

A party who seeks to recover for injury must prove not only that the other party was negligent, but also that such negligence was the proximate cause of the injury.

Proximate cause is an act or failure to act which in the natural and continuous sequence directly produces the injury and without which the injury would not have occurred.

Proximate cause exists when the injury is the natural and foreseeable result of an act or failure to act. A person is not legally responsible for the injury of another if the person's negligence is not a proximate cause of the injury.

In this case, plaintiff alleges that Conrail's negligence was a proximate cause of the death of Scott Jones. Plaintiff has the burden of proving proximate cause by a preponderance of the evidence.

Conrail alleges, on the other hand, that Mr. Jones' negligence was the proximate cause of his death. Conrail has the burden of proving this by a preponderance of the evidence.

There may be more than one proximate cause. When the negligent act or failure to act of one party combines with the negligence of another to produce injury, the negligence of each is a cause. It is not necessary that the negligence of each occur at the same time, nor that there be a common purpose of action.

A person is not responsible for the injury of another if his negligence is a remote cause and not a proximate cause. A cause is remote when the result could not have been reasonably foreseen or anticipated as being the natural or probable cause of any injury.

LIABILITY OF A CORPORATION

Conrail is a corporation. A corporation is a legal entity that can sue and be sued. A corporation acts through its officers and employees. It is responsible for their acts or

omissions when they act within the scope of their employment. Therefore, any act of an employee of Conrail performed within the scope of his or her employment, is an act of Conrail for which Conrail is liable.

COMPARATIVE NEGLIGENCE

I have instructed you that Scott Jones was negligent. If you find, in addition, that (1) Mr. Jones' negligence was a proximate cause of his death; (2) that Conrail was negligent; and (3) that Conrail's negligence was also a proximate cause of Mr. Jones' death, then you will be required to apportion the negligence. In other words, with 100 percent representing the total injury, you will be required to determine what percent is attributed to Conrail's negligence and what percent is attributed to Mr. Jones' negligence.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of all the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times you are not partisans. You are judges--judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Upon retiring to the jury room you should first select one of your number to act as your foreperson who will preside over your deliberations and will be your spokesperson here in court.

For your convenience and in order to assist you in reaching the proper verdict, the Court is submitting to you a set of written questions which are to be answered or not answered in accordance with instructions. Each interrogatory that is answered must be unanimously agreed upon and signed by all of the jurors.

(READ INTERROGATORIES)

As I have previously indicated, the answer to each interrogatory must be the unanimous answer of the jury. Your foreperson will indicate or write in the unanimous answer of the jury in the space provided. You will see that there are ten lines provided for each interrogatory. That means that each of you must sign the interrogatory. Your foreperson will fill in the date in the space provided.

It is proper to add the caution that nothing said in these instructions and nothing in any interrogatory prepared for your convenience is meant to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of the jury.

You will have a copy of these instructions with you in the jury room for your assistance during your deliberations. These instructions should answer any question that you have.

However, if during your deliberations you should desire to communicate with the Court, please reduce your message or question to writing, signed by the foreperson, and pass the note to the courtroom deputy, who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally.

I caution you, however, with regard to any message that you might send, that you should never state or specify your numerical division at the time.

The courtroom deputy may now escort the jurors to the jury room, taking to them the Court's charge, the interrogatories, and the exhibits which have been admitted into evidence.

APPENDIX I

D8 I-1974

RAILROAD-HIGHWAY GRADE CROSSING WARNING SYSTEMS

RECOMMENDED PRACTICES

BULLETIN NO. 7
Superseding Bulletin No.6

Published by the
COMMUNICATION AND SIGNAL SECTION
ASSOCIATION OF AMERICAN RAILROADS
American Railroads Building
Washington, D.C. 20036

RECOMMENDED PRACTICES

FOR

RAILROAD-HIGHWAY GRADE CROSSING WARNING SYSTEMS

Approved as an American National Standard by the
American National Standards Institute

D8 I-1974 (Supersedes D6. 1-1967)

Bulletin of
Communication and Signal Section

ASSOCIATION OF AMERICAN RAILROADS

1974

SPECIFIC REQUIREMENTS FOR AUTOMATIC SIGNALS

1. On tracks where trains operate at a speed of 20 miles per hour or higher, the signals shall operate for not less than 20 seconds before: arrival of any train on such track. On other tracks, used for switching and assembling trains such as industrial leads, sidings. switching: trucks and storage tracks, means shall he provided to warn approaching highway traffic.

2. Signals shall operate whenever any part of the train occupies the crossing.

3. Where train speeds on a given track vary considerably under normal operation and volume of railroad and highway traffic warrants special devices or circuits should be installed to provide reasonably consistent warning time for all movements. Under similar traffic volume conditions special control features should be used to eliminate the *effects* of station stops and switching operations within approach control circuits.

4. A bell, when used, should sound a warning during the time the signal lights are operating, except it may be silenced when head end of the train reaches the crossing, or when the gate has descended to within 10 degrees of horizontal.

SPECIFIC REQUIREMENTS FOR AUTOMATIC GATES

1. Gate arm lights shall operate in combination with the highway grade crossing signal at all times when gate

is in position to obstruct traffic. The light nearest the tip of the gate shall burn steadily and two lights shall flash alternately in unison with the signal lights.

2. The gate arm shall start its downward motion not less than 3 seconds after the signal lights start to operate.

3. The gate arm shall reach the horizontal position before arrival of any train and shall remain in that position as long as the train occupies the crossing.

INSTALLATION

Installation of railroad-highway grade crossing signals and devices shall be in accordance with Signal Manual Part 149. In some sates the authority having jurisdiction approves the plans for installation and if Federal funds are involved, approval of the Federal Highway Administration is likewise required.

TRAFFIC CONTROL SIGNALS NEAR GRADE CROSSINGS

The MUTCD contains recommendations for effective coordination of railroad-highway grade crossing signals with traffic control signals 4B-21 of the MUTCD reads as follows:

. . . .

APPENDIX J

IN THE COMMON PLEAS COURT
OF ERIE COUNTY, OHIO

Darlene M. Wightman, Admx. of the Estate of Michelle L. Wightman, Deceased, et al., *Plaintiffs*,	)	
v.	)	**Case No. 89-cv-416**
Consolidated Rail Corporation, *Defendant*.	)	

The Deposition of TERRY D. WARNER

Date: Friday, May 10, 1996

Time: 12:39 p.m.

Place: Conrail Claims Office
1415 Lincoln Way West
Osceola, Indiana

Called as a witness by the Plaintiffs in accordance with the Ohio Rules of Civil Procedure, pursuant to Notice.

Before Melody M. Goodrich, RPR, CM Notary Public, Cass County, Michigan

. . . .

[p.82]

A. Stop short of the crossing so you don't have the -- have to flag it or --

Q. Okay. But, I take it then, from time to time you might have to stop short of the crossing within 300 feet?

A. No. We can see ahead of time, and we know its --

Q. So you stop further away than 300 feet?

A. Right.

Q. What, 400, 500 feet, something like that?

A. Right.

Q. Now, when you stop 4 or 500 feet away and the gates are down and operating and there are no motion detectors, do you do the same thing, go to dim and just wait?

A. Right.

Q. Okay. You don't get off and protect the crossing in that situation?

A. No.

Q. Okay. Well, that's a third situation, waiting like --

something like airplanes on the runway at an airport waiting for a chance to take off?

A. Right.

Q. Okay. So that's a third situation. Are there any other operational situations that you can

. . . .

APPENDIX K

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

REBECCA A. JONES, *Plaintiff*,	)	
	)	Judge David Dowd
v.	)	Akron, Ohio
	)	
CONSOLIDATED RAIL CORPORATION *Defendant*.	)	**Civil Action Number 5:94CV2021**

Testimony of GAYLAND EMIGH

Date: May 2, 1996

* * *

[p.85] Emigh - Cross

system, specifically at the Back Orrville Road crossing, which we have now established was the same from whenever it was put in until the date that Mr. Jones had his collision here, I'd like to have you help the jury understand that warning system.

I think we can all agree that the basic purpose of gates and lights is to warn trains -- I'm sorry -- warn motorists that a train is approaching?

A: Yes.

Q. And of course the whole idea is to get them to stop at the gates and not proceed because there, is a train approaching?

A. Correct

Q. And it's my understanding from our earlier discussion that these gates and lights are designed with a specific sequence of warning steps in mind; is that correct?

A. Correct.

Q. And the first step in the warning sequence -- keeping in mind now we are talking about the kind of system that we all know was at the Back Orrville Road crossing, namely gates, automatic gates and flashing lights

A. Correct.-

Q. Let's talk about that sequence. Do I understand that the first step then is the what?

A. Is the flashing of the lights.

[p.86]

Q. And how long does that last?

A Lasts five seconds.

Q. Is it ever more than five seconds?

Q. Is it ever less than five seconds?

A. No.

Q. It's always five seconds?

A. Correct.

Q. All right. And I understand that one of the purposes of that five second red light is to alert people through a visual stimulus that a train is approaching?

A. Correct.

Q. And another reason for the five second delay I'm sure is so that cars don't get caught under the gates?

A. Right.

Q. In other words if you are there and it starts, you can keep going or you can stop short of the gates?

A. Right. You should stop when you see the lights flashing.

Q. Okay. That's the idea?

A. Right.

Q. All right. Now, the second step, Mr. Emigh, as I understand it, is the actual, what, the movement of the

gates from the perpendicular position down to the horizontal position?

[p.87]

A. Correct.

Q. And are these gates designed so that that, that second step in the warning sequence, takes place within certain predictable time boundaries?

A. Yes.

Q. How long?

A. Ten to 15 seconds.

Q. Okay. Are they designed to be programmed for ten minutes at least and not more than 15 seconds?

THE COURT: You said "minutes"?

MR. MURRAY: Did I say "minutes"? I'm sorry.

BY MR. MURRAY:

Q. So not less than ten seconds nor more than 15 seconds; is that correct?

A. That's the design.

Q. All right. And may we also agree that the movement

of the gates from the perpendicular to the horizontal is also part of the warning system, the stimulus given to the driver to alert that person that a train is approaching?

A. Yes .

Q. And they are designed that way?

A. Correct.

Q. All right. And, Mr. Emigh, as I understand it then, these gates are, also designed so that a train will arrive within a predictable period of time after the second step?

[p.88]

A. Yes.

Q. And we will talk about it in a moment, but one of the reasons for motion detectors is to preserve that sequence, is it not?

A. Correct.

Q. All right. Now, let's talk about the sequence that was built into this particular system that we are going to be talking about at the Back Orrville Road. And I wonder if, with Judge Dowd's permission, if the witness could step over here, Judge, to our model and maybe it would make it a little easier and a little faster to do it that way?

THE COURT: You may do so.

BY MR. MURRAY:

Q. Would you mind bringing the plans with you, Mr. Emigh?

Okay. I think, Mr. Emigh, the best why to do it would be let's work from this end, if we might.

MR. GODSHALL: Sure.

BY MR. MURRAY:

Q. so come on over here, if you would.

A. Yeah.

Q. And try to speak loudly enough so the members of our jury could hear you, if you would, please.

MR. GODSHALL: Why don't you put the plans over here?

[p.93]

perpendicular to horizontal, you have told us that they have to be adjusted I think you said ten to 15 seconds?

A. Correct.

Q. What are the time parameters after the gates come down when the train is supposed to arrive within this

warning system?

A. Thirty to 35 seconds.

Q. Okay. Now, is that, Mr. Emigh, is that 30 to 35 seconds from the time that the sequence starts, or is that 30 to 35 seconds from the time that the gates come down?

A. Until they are completely down, 30 to 35 seconds.

Q. Maybe I didn't ask the question right.

A. After they are down it's 30 to 35 seconds.

Q. Okay. So after they are all the way down then it's another 30 to 35 seconds?

A. Right

Q. Before the train arrives?

A. Correct.

Q. So the whole sequence then, if I get the picture .correctly, takes place in less than a minute?

A. Correct.

Q. All right, about, what, 40 to 45 seconds roughly, the whole sequence?

A, Right.

Q. Now, Mr. Emigh -- I'm sorry, I keep getting it

[p.94]

wrong -- am I also correct that it is well-known in the signal, department that when these gates and lights are down for longer than a minute or two, it is known that at that point people no longer wait at those gates; they go around the gates, do they not?

A. I've observed it.

Q. Yes. And we have already established that one of the reasons that you have the three-step sequence is you are trying to train people how these gates work, are you not?

A. Well, it's a warning device for them to stop.

Q. Okay. And in your experience you have observed that after gates are down for more than a minute, people generally will go around the gates, will they not?

A. Correct.

Q. All right. And you observed that during the time that you had some responsibilities at the Back Orrville Road crossing, did you not?

A. Correct.

Q. All right. I want to explore with you just a moment what kind of procedures, if that's the right word, that

Conrail has for evaluating crossings where you have got a situation where there is a change in the circumstances, and maybe we should -- maybe I should stop there and back up.

Can we agree that in 1992 when the track was changed to the southeast, that trains then began to stop here on a

[p.95]

fairly regular basis, to your knowledge, to wait for westbound traffic?

A. Yes.

Q. All right. And you observed that driving back and forth over that crossing, did you not?

A. Correct.

Q. Now, I want to explore with you, please, what procedures, to your knowledge, Conrail has for evaluating when, for example, a given crossing should have motion detectors. Do you understand what I'm concerned about?

A. Yes.

Q. All right. Now, we have already agreed, I think, that the reason that you have motion detectors and have had them on Conrail since 1976 is so when you have a situation where trains are stopping and the gates are

going down for extended periods of time, you can put the normal warning sequence back into the crossing, isn't that a fact?

A. Correct.

Q. All right So what I want to explore with you then is what kind of procedures you have for determining whether a crossing system with gates and lights that doesn't have motion detectors get motion detectors, okay?

A. Yeah.

Q. All right. And by the way, by way of -- just by way of background for this, you have, in your experience, have

APPENDIX L

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

REBECCA A. JONES, Exec., etc. *Plaintiff*,	)	
v.	)	
CONSOLIDATED RAIL CORPORATION *Defendant*.	)	**Civil Action Number 5:94CV2021**

DEPOSITION OF JOSEPH D. RUSSELL

a witness for the Defendant herein, called by the Plaintiff for cross-examination pursuant to notice and pursuant to the Rules of Civil Procedure, taken before me, Joan C. O'Donnell, a Notary Public in and for the State of Ohio, at the Mansfield Municipal Bldg., 30 North Diamond Street, Mansfield, Ohio, on the 16th day of March, 1995, at 2:15 p.m.

* * *

[p.58]

A. Yes.

Q. Now, you've already told us that you made that decision before you observed the train coming from

the opposite direction.

A. Yes.

Q. All right. Now, in making this decision, that is, to get out of the train, were you following the training or the rules that you're supposed to follow or were you doing this on your own initiative?

A. Doing it on my own initiative.

Q. Mr. Landis has told us that the railroad frowns on your getting off the engine.

A. Yes.

Q. Have you ever been instructed by anybody that under these circumstances you should not get off the engine and go to the crossing/

A. The FRA.

Q. Who, sir?

A. The FRA.

Q. Anybody else?

A. Yeah, the company officials.

Q. All right. Now, has someone from the FRA said that if you're in a situation, Mr. Russell, it's said to you if you're in a situation where you've got gates and lights

operating and know a train is coming from the opposite direction, the cars

[p.59]

are going around, you shouldn't get off and do anything to warn the motorists?

A. No, because you could be held liable.

Q. Did someone from the FRA tell you you could be held liable?

A. (The witness nodded affirmatively.)

Q. Do you remember who from the FRA told you?

A. No.

Q. Do you remember where it took place?

A. The Indianapolis division.

Q. Do you remember where you were when the conversation took place?

A. No. It's been a long time ago.

Q. Do you remember the circumstances?

A. Yeah, I was flagging a crossing.

Q. All right. And where were you flagging the crossing?

A. I can't recollect exactly where we were at, but I remember I got chewed out. I never forgot that.

Q. Let's pursue it. You don't remember when, but it was near Indianapolis somewhere?

A. Yeah.

Q. And what were the circumstances?

A. Flagging a crossing.

[p.60]

Q. I understand that. But what were the circumstances which caused you to flag the crossing?

A. I think -- well, I can't recollect. I think it was an emergency.

Q. So you had an emergency stop; you got out to warn motorists?

A. Yeah.

Q. To try to do what you apparently intended to do on this evening; is that true?

A. Yes.

Q. And you don't remember when that was, but it was more than ten years ago or less?

A. I can't recollect. I couldn't even tell you. I remember getting chewed out.

Q. Do you know who chewed you out?

A. The FRA man.

Q. Who was the FRA man?

A. I can't tell you. I can't remember.

Q. Did anyone from the company chew you out?

A. No, no.

Q. All right. You indicated that there had been occasions when you had been told by company people that you shouldn't get off the train to flag the crossing.

MR. HOWES: Objection. Go ahead.

A. We're not to flag the crossings.

[p.61]

Q. All right.

A. The only time -- the only time we flag the crossing is, when the crossing protector is not working, we get out and flag our way across.

Q. I'm sorry, sir. There was some noise in the hall.

A. The only time we flag the crossing is when the crossing protection is not there or not working; that's the only time we flag a crossing.

Q. That's what you're instructed to do?

A. Yes.

Q. And that's the only circumstances when you're instructed to get out and flag the crossing?

A. Yes.

Q. All right. As far as you understand it, the railroad expects you to stay in the engine under these circumstances and not go up and flag the crossing?

A. Yes.

Q. All right. Nevertheless, on this particular evening, you intended to go up and flag the crossing?

A. Yes.

Q. In other words, you were willing to put yourself at risk to go up and warn the motorists?

A. Yes.

Q. Now, let's talk about the risks. You have to get out of the engine.

APPENDIX M

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

REBECCA A. JONES, *Plaintiff*,	)	
	)	Judge David Dowd
v.	)	Akron, Ohio
	)	
CONSOLIDATED RAIL CORPORATION *Defendant*.	)	**Civil Action Number 5:94CV2021**

Testimony of JOSEPH RUSSELL

Date: May 2, 1996

* * *

[p.143] Russell - Cross

A. Yeah.

Q. All right. Now, Mr. Russell, as you approached this crossing on that day, you knew that this was a heavily traveled crossing, did you not?

A. Yes.

Q. And you knew it was rush hour?

A. I don't know about rush hour, but it was busy.

Q. And in fact when you got there and looked, there was a -- it was extremely heavy, the traffic was extremely heavy, was it not?

A. Backed up a little bit, yes.

Q. All right. And in fact it was your intention to go down after you stopped, it was your intention to go down to the crossing, was it not?

A. Yes.

Q. And the reason that you were going to go down to the crossing was to do what you railroaders refer to as protect the crossing?

A. Yes, protect the crossing.

Q. Now, I want to talk about that, Mr. Russell, because some of us here don't have the same -- I have some railroad experience. But that, that word "protect" has a distinct meaning, does it not?

A. Yes.

Q. And you are trained under Conrail's rules, under

[p.144]

certain circumstances, to protect crossings, are you not?

A. Yes, sir, under certain circumstances, yes.

Q. And you are taught, how to do it and what equipment to use?

A. Yes.

Q. You are taught, how to use a lantern or a flag?

A. Yeah.

Q. That's part of your training?

A. Yes.

Q. All right. And one of the situations in which you are trained to go down and protect a crossing -- let me withdraw that, if I might, and lay a little more foundation.

The idea behind protecting the crossing is to go. down and to actually use a. flag or a lantern to stop motorists from proceeding over the crossing?

A. Yes.

Q. All right. And that is a safety measure?

A. Yes.

Q. And it is intended to prevent accidents, is it not?

A. Yeah, protect the people.

Q. Yes. Now, one of the circumstances where you are trained to protect the traveling public is when, for example, you are pushing a train over a crossing?

A. Yes.

[p.145]

Q. In other words, so you don't have the engine up front with the lights on and so forth so you have to have a man at the crossing to perform this function of stopping the traffic?

A. Yes.

Q. Now, another circumstance, Mr. Russell, where you are required to go up and protect that crossing is if you have a mechanical malfunction in the gates?

A. True.

Q. Okay. In other words if those gates and lights are down, and they are down not because a train is coming, because of a mechanical function, you are trained under your rules to go up and stop traffic, aren't you?

A. Flag the crossing.

Q. To protect the crossing?

A. Yeah.

Q. Now, on this evening you recognized that you had a situation as you approached here that was identical to the situation where you have a mechanical malfunction, isn't that true?

A. I don't know if we had a mechanical malfunction

Q. No, no, there is no claim here of a mechanical malfunction, but it's the same difference, isn't it? If a train comes to a stop and the gates stay down, the traffic proceeds?

[p.146]

A. Yeah.

Q. All right. So you knew that you had a situation, even before you came to a stop, where the traffic was going over the crossing, did you not?

A. Yeah, they were going over the crossing.

Q. And you knew there was another train coming, isn't that true?

A. I knew there was another one coming.

Q. You didn't know the designation?

A. No.

Q. We know today that it was ENS 401?

A. Yeah.

Q. Right, am I correct?

A. Yes.

Q. Now, at that point you didn't know it was ENS 401, did you?

A. No, no.

Q. And the dispatcher didn't tell you that?

A. No.

Q. You could have called the dispatcher and asked, right, am I correct?

A. We could have, yes.

Q. But you are not trained to do that, are you?

A. No, we was in the process of getting the local off the train.

[p.147]

Q. All right. Now, is it a fact that Conrail's rules, while they require you to go up when there is a mechanical malfunction, they do not require you to go up after a train comes to a stop near a crossing, and the gates go down; you are not required to do it?

A. Not if we are back 300 feet.

Q. All right. So in other words as long as you stop back 300 feet, you are perfectly within your rights as a railroader to sit on the engine and not go up to the crossing?

A. Yeah.

Q. Is that true?

A. Yep.

Q. All right. And it doesn't matter how long the engine sits there, ten minutes or an hour, you are entitled to sit there, are you not?

A. Within the rules, yeah, all depends what the circumstances are.

Q. I understand.

A. Yeah.

Q. But there is no rule, for example, if INPI, if you knew INPI was going to be stopped for an hour, there was no rule that said you had to get off the engine with a

flag or lantern and stop traffic, am I right?

A. That's right.

* * *

[p.153]

Q. And the fact of the matter is you had every, intention to go up and stop the traffic, did you not?

A. Yes, I did.

Q. Because you recognized there was a dangerous situation?

A. Yep.

Q. Yes. And you intended to go up specifically -- I don't want to drag your deposition out -- to prevent an accident, that was what you had in mind?

A. Yep.

Q. All right. But the fact of the matter is that before you were able to get all those things done and because you didn't know when ENS was coming and you didn't even know ENS was there, you didn't get off the engine in time and before you knew it shortly after 6:00 o'clock you saw the lights in the distance?

A. Yeah.

MR. MURRAY: All right. May we have at this point, your Honor, we have been going a long time, and I wonder --

THE COURT: We will take the midmorning break, we will take about ten minutes. Please recall the Court's instructions, do not discuss this case among yourselves. You may file out. We will come and get you.

* * *

[p. 161]

Please stand over to the side so everybody can see.

So the engine, you are looking down, you are on number one track?

A. Yes.

Q. And you can see the curve?

A. Yes.

Q. Now, trying to go back, and I know this won't be easy for you, but I need to go through it carefully.

You are looking down, you have got your winter clothes on, got your boots on, you have got them buckled up and I take it do you have a lantern to take out with you?

A. No, it wasn't dark that day, but it was getting there.

Q. You were going to take the lantern and maybe some other safety equipment with you?

A. Yeah.

Q. Okay. As I get the picture then you are stopped back by that oak tree, you think it was by the oak tree?

A. Yeah.

Q. And at that time you were aware there was traffic going over the crossing?

A. Yes.

Q. All right. And your intention was to go up and stand -- when any train that came along, to stand at the crossing so you could stop traffic when any train came?

* * *

[p.168]

BY MR. MURRAY:

Q. And you notice your answer was "I don't know. They just never put it in the books."

A. Yeah, that's true. They changed their policy, though.

Q. Now, Mr. Russell, you have been going out to protect crossings and stop traffic in this situation for years, have you not?

A. Yes, I have.

Q. And isn't it a fact that you have never held up the movement of a train on any occasion doing that?

A. Not as far as I know I haven't. I always figured it was part of my job.

Q. I understand that, Mr. Russell?

MR. MURRAY: May I -- I'm not going to ask you any further questions, but may I repeat the Jones family is not suggesting that you --

THE COURT: Well, you have already said that.

MR. MURRAY: I have, and I will quit. Thank you.

THE COURT: Anything at this moment?

MR. GODSHALL: Mr. Russell. Mr. Landis now?

MR. MURRAY: Yes, please.

APPENDIX N

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

REBECCA A. JONES, *Plaintiff*,	)	
	)	Judge David Dowd
v.	)	Akron, Ohio
	)	
CONSOLIDATED RAIL CORPORATION	)	**Civil Action Number 5:94CV2021**
Defendant.	)	

Testimony of JOHN LANDIS

Date: May 2, 1996

* * *

[p.182] Landis - Cross

crossing?

A. I was not told.

Q. All right.

A. I was not interested at that time.

Q. All right

A. Because I had my helper attached yet.

Q. All right. I understand. But the only information that you were given was that there was a westbound train?

A. Right.

Q. Did the dispatcher tell you whether you would be held for one or more trains, or didn't you know?

A. I did not know.

Q. Sometimes I take it you are held for more than one at that location?

A. Right.

Q. All right. So from your past experience, and we went over this on your deposition, there have been occasions when you come to a stop at this location or at other locations before westbound traffic, and you have been held only a few minutes?

A. Right.

Q. And other occasions it can be up to an hour or longer?

A. Right.

Q. And you had no way of knowing as you approached the

[p.183]

point where we know you stopped, you had no way of knowing at that point whether you would be held for a matter of minutes or an hour or longer, did you? You didn't know?

A. I did not know.

Q. Now, Mr. Landis, I assume you have received training, you are an experienced engineer. Are you trained under those circumstances to ask the dispatcher whether you are going to be held for an hour or ten minutes, or in other words how long you are going to be held?
Are you trained to do that?

A. Yes. The reason I had to go as far as I did, I had to clear that detector.

Q. I don't question that, Mr. Landis. I don't question that.

I'm just -- I just want to know when you got on --a westbound train, but are you trained to ask the dispatcher anything more like what's the name of the train that's approaching or when is it going to get there?

A. While I was not ready to proceed, I had work to do to cut off my helper, then I ask whether he's going to

handle this.

Q. Okay. Maybe I'm not making my -- all I'm trying to find out is that under, your training, as far as your use of the radio with the dispatcher is concerned, are you advised

* * *

[p.287]

to where you were stopped?

A. Yes

Q. And between you, you kind of decided right by the big oak tree?

A. I was well behind it.

Q. You think you were behind the oak tree, all right. Now, as you came over the device which activates the gates and lights and approached the stopping -- the point where you stopped, you, I take it, were able to see that the gates were down and the lights were flashing?

A. Correct.

Q. And you knew, of course, that this was a -- you knew from your experience that Back Orrville Road is heavily traveled, and you knew this was rush hour?

A. Right.

Testimony of John Landis, 5/2/96.

Q. And again I think we can agree that traffic was heavy --

A. Heavy.

Q. -- that night?

And you saw traffic moving both ways, and again I want to acknowledge for the jury we have talked about this at some length in your deposition, you remember that?

A. Right.

Q. So again in the interest of moving it along I'm leading here to keep it moving, but can we agree you saw

[p.188]

from the engine, you had a good view from the engine and saw that the traffic was heavy and it was moving in both directions over the crossing?

A. When?

Q. Well, after -- certainly after you came to a stop, you observed the traffic was moving over the crossing?

A. From my left.

Q. Okay. From your left?

A. North.

Q. From your left you saw traffic moving over the crossing?

A. Right.

Q. All right. .And I think you told us that you saw numerous cars go over prior to this collision?

A. Correct.

Q. Now, Mr. Russell has told us, Mr. Landis, that when the train we now know is ENS 401 -- you are aware of that now?

A. Okay. The symbol, yes, I've heard it.

Q. Have you ever operated the ENS 401 yourself?

A. Yes.

Q. Okay. What it stands for, three light engines?

A It can be any number

Q. Okay. But it's a job designation that you were familiar with?

APPENDIX O

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

REBECCA A. JONES, Exec., etc., *Plaintiff*,	)	CASE NO. 5:94CV2021
	)	DEPOSITION OF: Curtis D. North
v.	)	
	)	DATE:
CONSOLIDATED RAIL CORPORATION	)	March 17, 1995
Defendant.	)	REPORTED BY: Leslie Griffith

\- - -

CURTIS D. NORTH, a witness herein, called upon for examination taken pursuant to the Rules of Civil Procedure by and before Leslie Griffith, a Court Reporter and Notary Public in and for the Commonwealth of Pennsylvania, at the offices of Golden Triangle Reporters, Suite 1095, One Gateway Center, Pittsburgh, Pennsylvania on Friday, March 17, 1995 commencing at 10:10 a.m.

* * *

[p.97]

A. Why? Because they are not supposed to be on the

crossing. The gates and the lights are down. They are supposed to be clear of the crossing, and they are trespassing.

Q. You treat them as trespassers?

A. Somewhat.

Q. Let's assume you have a right to think of them as trespassers. So you considered the people going over the gates and over the crossing while the gates and lights were operating as trespassers; is that correct?

A. Basically.

Q. Now, let's assume that in your mind that you are right to think of them as trespassers. Now, if you knew, however, that there were people who you considered trespassers in danger at the crossing before you got there, would you have done anything to have reduced the possibility of a collision?

A. Yes.

Q. What would you have done?

A. Slowed down.

Q. And do I understand it that you would have slowed down to a speed that would make it possible to avoid hitting these trespassers?

A. Probably.

APPENDIX P

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

REBECCA A. JONES, *Plaintiff*,	)	
	)	Judge David Dowd
v.	)	Akron, Ohio
	)	
CONSOLIDATED RAIL CORPORATION *Defendant*.	)	**Civil Action Number 5:94CV2021**

Testimony of CURTIS NORTH

Date: May 2, 1996

* * *

[p.208] North - Cross

Q. But you knew from prior experience that it was possible that a train would be stopped at that crossing?

MR. GODSHALL: Objection.

MR MURRAY: I'll rephrase it

BY MR. MURRAY:

Q. Did you know from prior experience whether or not a train might be stopped there?

MR. GODSHALL: Objection.

THE COURT: Overruled.

BY MR. MURRAY:

Q. Mr. North, you may answer.

A. Did I know from prior experience -- say that again.

Q. Yes. Did you know from your prior experience as you were coming through this interlock, down this ten mile stretch of track, did you know that there might be a train stopped waiting for you to clear the interlock, might be stopped here at BOC, at the Back Orrville Road crossing?

A. Might be.

MR. GODSHALL: Objection.

THE COURT: Overruled. You may answer.

THE WITNESS: I did.

THE COURT: I didn't hear your answer.

A. Maybe.

THE COURT: Maybe. Okay.

BY MR. MURRAY:

[p.209]

Q. In other words, you knew it was possible. You didn't know whether there was one stopped or not?

A. Correct.

Q. And you knew that was possible from your prior experience?

A. (Nods affirmatively).

Q. Isn't that true?

A. Correct. Yeah.

THE COURT: Do you customarily get information from the dispatcher as to whether or not there is a train stopped?

THE WITNESS: No.

BY MR. MURRAY:

Q. And you are not trained to ask, are you?

A. No.

Q. So as you approached --

THE COURT: Let me, before you get to that.

MR. MURRAY: I'm sorry

THE COURT: As you approached the interlock --

THE WITNESS: Which one, sir?

THE COURT: Well, that's a good question. When you are east of the interlock, at what point do you know whether or not you are going to wait for somebody else or you are going to get the single track?

* * *

[p.219]

you observed a car or cars -- and I will ask you the specifics in a moment -- occupying the crossing?

A. No, not exactly, no.

Q. Do you know whether you had come out of the curve at that point and were in the more or less straight portion of the track?

A. I imagine so. It makes sense.

Q. Okay. In other words you were sitting in a unit that had nothing to obstruct your vision ahead, isn't that true?

A. True.

Q. Okay. In other words you were sitting in a unit that had nothing to obstruct your vision ahead, isn't that true?

A. True.

Q. So that as you approached the crossing -- trying to find one that will help us here. Can you see this, Mr. North, from there?

A. Yes.

Q. A number of witnesses have referred to this. This is marked as Plaintiff's Number 4 for the record, and I am going to stand back here so I can make sure everybody can see this.

But as you came out and got into this stretch here where the track is no longer curving or at least noticeably curving, at that point do you remember whether you saw any vehicular traffic occupying the crossing?

A. Well, I don't remember at what point it was that I saw the vehicles going over the crossing. I just know that when I got there, that there was vehicles coming across the

* * *

[p.226]

Q. Let's take a mile then. Let's suppose you are a whole minute away, is there any question whatsoever if someone had called you and said, "Mr. North, we have a situation up here, heavy traffic proceeding over, nobody is out there protecting the crossing," can we agree that within, a mile you certainly could have stopped or slowed down to any speed you needed to?

A. I could have slowed down appreciably, yes.

Q. Do you think you could have stopped?

A. Maybe.

Q. Mr. North, let me just tell you I don't think there is any dispute here that after this happened you got your train stopped within 1441 feet, okay? And you know that's about a quarter of a mile. Are you with me?

A. Yes.

Q. We are just trying to learn from you, I need your help, we all need your help. I'm just trying -- you got the train stopped I assume by putting it in emergency?

A. Yes.

Q. Do you remember when you did that?

A. No.

Q. We talked about the braking system. Is the braking system, the automatic system, is that the -- is that your

emergency system?

A. Yes.

[p.227]

Q. Okay. So when you saw, what was it, when you saw the van is when you put it in emergency or about when you saw the van?

A. I can't remember really.

Q. But what I'm trying to find out is if you got it stopped back here, I mean 1441 feet after the collision, then all I'm trying to find out is if you are going the other direction and without having to use the emergency brake, just use whatever independent brake or your dynamic brake, could you get your train slowed down or stopped within a half mile?

Keep in mind you got it stopped with the emergency brake.

A. But it's different; the emergency is emergency and slowing --

Q. Okay. I want to find out where you would be confident. At one mile could you --

Q. All right. So no question in your mind if someone had alerted you to the situation at the crossing a mile out, that you could have been either slowed or stopped by the time you got there if you needed to?

A. Probably.

Q. All right. Now, Mr. North, do you know from your training what Conrail's policy is in a situation where you

[p.228]

are coming towards a crossing like this and where you know from your past experience that a train might be stopped here because, you know, to wait for you to clear; do you know what is your training or policy as far as what you are supposed to do, if anything, to find out whether or not when you come around that curve there is a train stopped?

A. I don't know.

Q. You don't know?

A. No.

Q. Okay. Do you know whether or not under these, in this situation, are you allowed, if you, for example, let's suppose on that night that for some reason you thought maybe tonight there will be a train there, when you come around the curve are you allowed to use your own judgment and, say, start slowing the train down just on your own initiative or authority if you just maybe have a hunch or something like that, or are you supposed to just keep going at the --

A. I don't know. I never -- something like that's never

really, you know.

Q. You just don't know?

A. Just don't know.

MR. MURRAY: May I have a moment, Judge?

THE COURT: Yes.

(Pause).

APPENDIX Q

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

REBECCA A. JONES, *Plaintiff*,	)	
	)	Judge David Dowd
v.	)	Akron, Ohio
	)	
CONSOLIDATED RAIL CORPORATION *Defendant*.	)	**Civil Action Number 5:94CV2021**

Testimony of WILLIAM BERG

Date: May 2, 1996

* * *

[p.387] Berg - Direct

high compliance gives you high safety levels.

Q. Dr. Berg, has any research been done specifically as to how long a time must elapse after the gates have been activated and brought down to the horizontal position before which they will lose credibility with the drivers?

A. Well, there have been studies, but basically what you find is as you started approaching at say one minute and you get in the range of the gates being down for a minute with no train yet at the crossing, you start to see a rapid drop in the credibility of the device. In other words, people will start to interpret this as a malfunction, and depending upon the situation some people may attempt to turn around and go the other direction, some people will drive around the gate and this is well-known, and that's why from an engineering standpoint we design the systems that can deal with this problem to eliminate it.

Q. From a human factors standpoint, that is as to how we human beings respond when confronted with the situation where you have got the gates down, is there any difference in terms of known human behavior whether or not there is a stopped train within view of the crossing or whether you have got, say, a mechanical malfunction?

A. Well, there is a significant difference. If you have let's say purely, let's say some component failed like in your house a light bulb goes out and you have to replace the

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light bulb, if you had a component that failed and the gates were down and there was no train anywhere, that would have an adverse effect on safety because it would reduce the credibility, and the next time you saw a gate down for a long period of time, how do

you know whether it was a malfunction or something else in terms of a component that failed.
When you have the gates being down for a long period of time and a train actually physically stopped and in view very close to the crossing, well, now it's obvious to a motorist that a train is the hazard, and I can see the hazard, and I can see that it's stopped, and it's been stopped, and so the conclusion is often on the part of the motorist there is no hazard at the moment; for some reason this gate is down, I have waited a reasonable length of time, this train hasn't moved, it must be okay for me to proceed.

Q. And what bearing does that have, if any, on the likelihood that people will proceed?

A. Well, without question, it dramatically increases the the likelihood because you see something that's associated with a hazard, in other words it's a train but it's clear that particular train clearly is not a hazard because it's stationary.

The problem comes, there's two problems. When you

APPENDIX R

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REBECCA A. JONES, *Plaintiff*,	)	
	)	Judge David Dowd
v.	)	Akron, Ohio
	)	
CONSOLIDATED RAIL CORPORATION	)	**Civil Action Number 5:94CV2021**
Defendant.	)	

_____/

Testimony of GLENN SLYKER

Date: May 2, 1996

* * *

[p.491] Slyker - Direct

A. Yes, I did.

Q. What would they do?

A. They would go around the gates in 99 percent of the cases.

Q. All right. Did your railroad have rules or policies or

practices that you were trained to follow in that circumstance?

A. Yes, the railroad expected us to flag these crossings.

Q. Now, would you always flag the crossing, or just sometimes?

A. We flagged them all the time. If there was traffic, we flagged them all the time.

Q. Can you explain for the jury how you would flag them? What would you do?

A. We would send the head brakeman or whoever was available down to guard the crossing.

Q. Okay. At any time that a head brakeman went down to guard a crossing, did anything unfortunate happen, to the person who protected the crossing?

A. Not within my knowledge.

Q. No injuries, no accidents, no nothing?

A. No, not that I can recall.

Q. Okay. In your experience, Mr. Slyker, was there anything else that you can recall doing in that situation,

[p.492]

that is where you have got a stopped train, and where the gates are down and another train might be coming. We are assuming obviously a multiple track crossing.

Is there anything else that you did at least on occasion to protect against the possibility of a car/train collision?

A. We always flagged the crossing. There are, I suppose, other things, that you could do if you had to, but we flagged the crossing consistently.

Q. Okay. Well, let's just say, for example, you had the members -- it was cold and you didn't want to go outside, is there anything else, let's say if it's down below freezing, are there other things that you could do without substantially slowing down the operation, if you wanted to make sure that the crossing was protected?

A. Well, you could always cut the units off and take them up close to the crossing, or you could go across it as soon as another train approached, or you could even cut one unit off of a consist and go up across the crossing and --

Q. Well, let's assume that you were concerned about somebody becoming hurt at the crossing, and/or it was too cold out or there was ice on the ground or something like that, can you show us how you would do that, just briefly show us how you would do that?

Assume we have three units on INPI, and just explain

APPENDIX S

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

REBECCA A. JONES, *Plaintiff*,	)	
	)	Judge David Dowd
v.	)	Akron, Ohio
	)	
CONSOLIDATED RAIL CORPORATION	)	**Civil Action Number 5:94CV2021**
Defendant.	)	

Testimony of TIM SHELLENBERGER

* * *

[p.634] Shellenberger - Cross/Murray

A. If we had a mechanical malfunction of some sort where the gates did not come down our people are required to go up and protect the crossing.

Q. Why is that, Mr. Shellenberger?

A. If the gates don't come down?

Q. Yes, why.

A. Then we're required to protect against trains on the

track.

Q. Now suppose the gates rather than not coming down they do come down and they are down for an extended period of time, for say 15 minutes because of a mechanical malfunctions, do the rules require you to go up and protect under those circumstances?

A. If -- all circumstances are different. If you were -- if you had gates that were down, you would go up to prevent cars from going around them.

Q. Why?

A. Because the gates are down and you've not supposed to go around down gates.

Q. But we know people do?

A. Yes.

Q. And that's why you sent someone up to warn them not to go around?

A. If there was a train coming, yes, sir.

Q. So if I get the picture then, if INPI had stopped 299

APPENDIX T

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

REBECCA A. JONES, *Plaintiff*,	)	
	)	Judge David Dowd
v.	)	Akron, Ohio
	)	
CONSOLIDATED RAIL CORPORATION	)	**Civil Action Number 5:94CV2021**
Defendant.	)	

Testimony of JOE McGINLEY

* * *

[p.782 McGinley - Cross/Murray

made the determination to stop at that signal.

Q. I mean if they were stopped there for a half hour and there was an emergency vehicle that needed to get across, what would we do in that case?

A. I can't tell you what the train crew did and why they did it.

Q. (understand, Mr. McKinley, I have just a couple of questions and I'll be done. We have heard a great deal here about various possible measures that Conrail might have taken here and one came up this morning that had frankly slipped my mind and that is Mr. Russell told us that at some crossings, to his knowledge or his experience, you can supply your employees with a little key which would allow them to go up and operate the gates and lights as if there were motion detectors, are you aware of that?

A. Yes, there are buttons that we can put on the side of the instrument cases and there's a padlock that the train crews and members have keys to and they can go in and hit the raise button or the lower button, yes.

Q. Now do you know whether or not the box, I have heard it referred to as a power box, what do you call it?

A. The instrument case.

Q. Yes, instrument case. Do you know where the instrument case at this particular crossing had buttons like that that could be pressed?

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A. No, they did not.

Q. Is there any reason again from an engineering standpoint why if Conrail felt that that was the best way to reduce the possibility of something like this

happening, is there any reason why they couldn't have installed those buttons in the instrument case?

A. It's my understanding they did in fact afterwards.

Q. I have nothing further -- I'm sorry, you mean after Mr. Jones' tragedy?

A. That's correct.

REDIRECT EXAMINATION OF JOE McGINLEY

BY MR. GODSHALL:

Q. I want you to imagine you're in Pittsburgh in the dispatcher's office and this isn't a computer that he's looking at but this acts as CP Or and he's the next westbound on CP?

A. Big Run.

Q. As INPI approached Back Orrville crossing the dispatcher knew electrically through the signals being transmitted that that train was between CP Big Run and CP Or, is that correct?

A. That's correct.

Q. Did the dispatcher know by the signals provided to him at which crossing INPI was stopped?

A. No. No.

APPENDIX U

TESTIMONY OF MATT SEILER

A. About right here.

Q. Okay. The record should indicate that would be to the southeast, perhaps can we agree, Mr. Godshall, about two inches to the south -- would be two inches on the model to the northwest of the yellow sticker that was placed there by the witness Mrs. Nagucki?

MR. GODSHALL: We can agree to that, sir.

MR. MURRAY: Thank you.

BY MR. MURRAY:

Q. All right. Mr. Seiler, now, did anything happen prior to what we know was a collision between three Conrail engines and Mr. Jones' car, did anything happen prior to that moment which alerted you to the possibility that something might happen?

A. A horn sounded on the train, but it was in the distance behind me.

Q. Okay. Now, let's just get you -- you are out here. Stay there, and please continue to look at the jury.

A. Okay.

Q. You are here?

A. Yes.

Q. Working. You hear a horn, I think you said behind you?

A. Yes.

Q. All right. You had been outside before and heard

* * *

[p.347]

Q. But what you remember hearing and seeing down until this collision occurred.

A. Well, I, after I heard the horn blew I kept a pretty close eye on it because I figured the train would be moving fast because they always did, and so I kept an eye sort of on the crossing and the cars turning around like they always do because they turn around in my driveway all the time.

And I was watching, and Mr. Jones was, oh, somewhere in this area, he was past the point of turning around when I noticed him look back.

Q. Please just take a minute.

A. Okay.

Q. Now, at this point you said there is a place where you can turn around?

A. Yeah.

Q. Where is that?

A. Right here (Indicating).

Q. Okay. Now, you say that you observed a car which you believe was the Jones car?

A. Yeah.

Q. All right. Can you identify it? What did it look like?

A. Dark.

Q. All right. At all times from that moment when you

* * *

[p.350]

as if you are Mr. Jones?

A. Yeah.

Q. I'd just like to have you show us what you saw.

A. (Indicating) He looked back like this, that's the only

way you can see the tracks behind you because he was at the point where the -- this shed is here, so he had to look back in this picture to get a glimpse at the tracks, so that's where I would imagine he was looking when he turned around because he really had to turn back.

Q. Okay. Now, Mr. Seiler, have you ever done that yourself --

A. Yes.

Q. -- as you are approaching? So there is an opening there where you can look back?

A. Yes.

Q. Is that correct?

A. Yes.

Q. Now, my question to you is after you made this observation of Mr. Jones, do you remember whether at that point you were able again to see whether he again as he approached looked at any other time back over his left shoulder?

A. No.

Q. Are you saying that you looked at him and he didn't, or you didn't -- you just didn't observe?

* * *

[p.352]

might, for a moment.

A. Okay.

Q. Now, we can assume, can't we, that there's still cars behind Jones?

A. Yes.

Q. All right. Now, very slowly and very carefully, please tell us what you remember happening from that point on.

A. Both the van and Mr. Jones went around the tracks and they were moving very slowly, the van was moving very slowly, and they were bumper --

Q. Let me stop you. How slowly?

A. Walking speeds. I could have walked with them.

Q. Okay. All right. Now, at this point where you have got the van here and the Jones car, you are still watching this?

A. Yes.

Q. Were you aware at that point of a train?

A. Yeah.

Q. How so?

A. It was coming behind my mobile home.

Q. How could you tell?

A. Sound.

Q. What could you hear, the horn?

A. No, just the sound of the train coming.

APPENDIX V

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

REBECCA A. JONES, *Plaintiff*,	)	
	)	**Civil Action**
v.	)	**Number 5:94CV2021**
	)	
CONSOLIDATED RAIL CORPORATION *Defendant*.	)	

TRANSCRIPT OF PROCEEDINGS HAD BEFORE THE HONORABLE DAVID D. DOWD, JUDGE OF SAID COURT, ON THURSDAY, NOVEMBER 2, 1995 AT 1:30 O'CLOCK P.M.

* * *

[p.47]

gates, flashing lights, horns blowing, lights flashing and they don't look and make any effort, yes.

THE COURT: Okay. What if I don't buy that?

MR. HOWES: That's why I say there are a lot

of other issues.

THE COURT: What I'm trying to focus on now is, if I conclude that you don't get summary judgment on the wanton and willful misconduct, then do I have any facts in dispute on the claim that you were negligent?

MR. MURRAY: Well, that's my point.

THE COURT: And as I understand, Mr. Murray's position is no; if there are no material facts in dispute, we win.

And I'm asking you what material facts do you think are in dispute that make it a jury question?

MR. HOWES: Well, for instance, Mr. Murray said we should have flagged the crossing. I say he has come up with a whole laundry list of negligent acts on our part.

THE COURT: It seems to me the predicate this whole lawsuit turns on is whether or not the railroad has a duty of care to the traveling public where they have set up a situation that appears to constitute a malfunctioning gate.

In that situation, do they have a duty beyond seeing that the gates work and the flashers work and the

[p.48]

oncoming train whatever it's traveling at, has its horn blowing and lights working?

MR. HOWES: We start out with the proposition we are defining it as a malfunctioning gate, which is contrary to what the FRA and the law and the railroad calls it. It is not a malfunctioning gate, it is a functioning gate that is functioning properly.

THE COURT: Well, it's functioning properly at the time of impact.

MR. HOWES: No, it's functioning properly at the time it came down, and at the time it was down, because there was a train within the crossing.

THE COURT: So if it's down there for five hours, it is a functioning gate?

MR. HOWES: It's not a malfunctioning gate.

THE COURT: What is it then? So nobody can go across that crossing for five hours?

MR. HOWES: Nobody can go across that crossing for five hours without looking to see whether or not there is a train coming, if in fact they are looking at a stopped train.

THE COURT: Which means you can never be negligent?

MR. HOWES: Not for that. Not for just that. The question then becomes should we have sent

* * *

[p.58]

going 60 miles per hour or 10 miles per hour if a person who drives in front of it does so in such proximity that they are going to hit it. The point is that you can slow the train down to any speed you want to, but if the person is going to drive in front of the train and not look and the train hits it, it doesn't matter how fast we were going. Because we think we have a right to assume not that people won't drive around gates, but that they won't drive in front of an obvious oncoming train with all of the signal devices and all of the warnings that this train had as it approached this crossing.

Now to say we made no effort to flag the crossing. If you again look at the Federal Regulations which were issued after this accident, you will find that all of the steps that are to be taken, the FRA dictates are to be taken when there is in fact a false or -- a malfunction or a false activation, it's not taken by the train crew, it's taken by other personnel who are directed to do things with reference to the problem at that crossing. The FRA doesn't want employees getting off of the trains and going to crossings in an attempt to do something at the crossing.

Ohio law prevents us -- and let me repeat this -- Ohio law prevents our people from going to the crossing

and flagging people around gates and flashers.

[p.59]

The Ohio Statute specifically prohibits anybody from violating a traffic control device except at the orders of policeman.

So our flagman goes down to that crossing and he can stand there and he can waive his arms, and he can say don't come around the gates and don't go through the lights, and he is doing exactly the same thing that the gates and lights are already doing. And he can stand there and waive his arms and I suppose yell there is a train coming to those people who don't look.

But he has no right to stand there and direct traffic around that traffic control device until a train comes and then try to stop the people from coming around there.

You asked the question as to the distance involved in this train and these crossings. This train was brought to a stop in response to an approaching signal, and these are the great big black disks that have the various lights on it. And that signal told him that he had to stop at a point ahead of where he stopped. He stopped his train where he did in response to that approaching signal which makes this normal train operations. This was not an emergency, this was not a malfunction. He stopped there so that he did not violate the law and block this crossing June 29, 1998

* * *

[p.78]

conscious disregard.

But our theories are basically the same. That when you activate gates and lights, you know people are going to pull onto that crossing and you don't take available precautions to warn them, that's conscious disregard for the rights and safety of others in circumstances where there is a great probability of harm.

THE COURT: The court's responsibility here is to follow Ohio law as I am able to find it to be.

MR. MURRAY: This would be an Erie Tomkins case, as far as I'm concerned, this is brought under state law.

THE COURT: Any interest in me submitting the issue to the Ohio Supreme Court? I might be able to construct the issue here, I've done that before. I have the power to do that.

They have the power to tell me to go blow smoke. They have been pretty good in taking them in whenever I ask them.

Really, the issue is whether or not the Wightman concept would apply in a little dissimilar fact situation.

MR. HOWES: Can I respond to any of this?

THE COURT: Yes, I have ten minutes. Sure Phil, go ahead.

[p.79]

MR. HOWES: Well, first of all, Wightman -- and the whole punitive damage aspects of Wightman is still not settled. We have got to go back and retry Wightman, and Mr. Murray knows that, and he knows that many of the court rules and orders weren't followed in that case. And I'm not going to bore the court with all the things that went on, but we are going back and retrying that issue on the punitive damage issue claim in that case.

THE COURT: Let me put your mind at ease. I really don't see punitive damage in this case. I'm hard put to see punitive damage in this case. I'm far more focused on the question of duty and negligence, and whether or not the conduct rises to the level of wanton and willful, as you allege.

But the punitive damage thing, in my mind, isn't there.

MR. HOWES: Okay, your Honor. I'll move on to something else.

The exhibit that Mr. Murray put up here -- and ignoring --

THE COURT: I understand. You think the predicate for it is not reached in this case.

MR. HOWES: Well, that's what it says. Normal train movements or switching operations are not considered to be interference with the warning system operations.

* * *

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THE COURT: So, if you are a mile away, going 60 miles per hour and you see a truck stalled on the highway, you can keep going 60 miles per hour because that's the speed limit?

MR. HOWES: No.

THE COURT: No? Why don't you win under preemption?

MR. HOWES: Because we -- at that point -- because I then know there is an obstruction on the rail ahead of me and I have an obligation to prevent it, if I can.

THE COURT: But you don't have an obligation to protect the motorists who have been misled into believing the gates are malfunctioning?

MR. HOWES: I don't believe --

THE COURT: It seems to me we are just getting circular, Phil. And you may well be right. I mean, I'm not -- I'm just trying to get the position of the parties.

MR. HOWES: The deposition of Mr. Landis, the engineer -- it's on page 103. When he's asked the questions as to whether he did anything and what he said.

THE COURT: He says he didn't get on the radio.

MR. HOWES: No, I misspoke. That's not what he said -- oh yes, he did. I said, "And you did try to communicate to the engineer of the opposing train?"

APPENDIX W

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

REBECCA A. JONES, *Plaintiff*,	)	
	)	Judge David Dowd
v.	)	Akron, Ohio
	)	
CONSOLIDATED RAIL CORPORATION	)	**Civil Action Number 5:94CV2021**
Defendant.	)	

COLLOQUY OF COURT AND COUNSEL

Date: April 26, 1996

[p.422]

THE COURT: Well, I would appreciate it if before the day's out that you provide the court with a copy of her report. And I'm going to delay the ruling on that.

MR. MURRAY: Okay.

THE COURT: There seems to be a considerable battle going on over the description to be applied to the signal system at the site of the collision. And the defendant wants the court to prohibit the plaintiff from talking about a

malfunctioning signal system and/or that Conrail had a duty to utilize the alternative warning measures described in the Code of Federal Regulations .And the briefs are rather extensive on both sides of the issue.

I gather that there is no argument for the proposition that the gates and the light were not in disrepair, neglected or broken down at the time?

MR. MURRAY: That's correct.

THE COURT: But I gather there is also no dispute that the system was activated by a stopped train.

MR. GODSHALL: That's correct. But it would also -- its important to remember that the opposite train coming from Massilion would have activated it and the gates would have been down anyway, and that also would have activated the gates to come down.

[p.10]

So yes, the initial event that activated the gates and flasher to come on was the stopped train.

THE COURT: The stipulation I believe that you prepared is very minimal, doesn't include anything about the gate, does it? Other than, I mean, that it was down.

Do either of you have a copy of your stipulation? I can go find it if you don't have it.

MR. MURRAY: Judge, are you referring to the

submission --

THE COURT: Yes, let me find it.

MR. MURRAY: We have them. I've got the original I was just filing this morning.

THE COURT: You say it's in this document?

MR. MURRAY: I'm not clear what stipulation you were referring to.

THE COURT: The parties have a very brief stipulation pursuant to the trial order stipulation of undisputed facts.

MR. MURRAY: I see, yes.

THE COURT: Well, I wonder whether the problem could be resolved by adding to the stipulation the proposition that the parties agree that the gates and lights were not in disrepair, neglected or broken down but when the plaintiff uses the phrase malfunction or false activation, .it's intended only to mean that the gates and

[p.11]

lights, when activated by a stopped train, arguably had the opposite effect as that intended. Namely, rather than the warning of the need to stop, they suggested to oncoming motorists that they could proceed.

That's the way in which you want to use the phrase malfunction or false activation, as I understand.

MR. MURRAY: Yes.

THE COURT: And you wanted it clear, talking about -- when I say you, I mean Conrail -- that the lights, that there was nothing in disrepair, neglected or broken down about the signal light system.

MR. GODSHALL: Yes, your Honor. But the word "function" is very important. You know, it's a term of art that's used in the CFR's, used in the regulations. And it opens the door to a whole 'nother series of discussions. And it's not just one of us choosing a word to describe an incident, it has consequences that we believe are going to be used in an unfair manner to confuse the jury.

THE COURT: I don't think the jury is going to have any trouble understanding the respective positions of the parties.

MR. GODSHALL: I don't think so either, but we are going to have expert testimony and other testimony premised on the word "malfunction", that's the issue --

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one of the issues.

MR. MURRAY: May I, your Honor?

It seems to me that dragging the regulations in here is a bit of a red herring. In our submission we point out if you take the literally dictionary definition of the word, we have got a malfunction here.

Colloquy of Court and counsel, 4/26/96

I went to my thesaurus last night to see what some of the synonyms of the word "function" are. And the word "function" means to use; it means purpose -- these are synonyms now -- task, assignment, mission, job.

And all we are saying here is that on the face of it, if a system that's designed to stop traffic from proceeding over the crossing, particularly when trains are coming, fails to do that, then in the literal sense of the term "malfunction," these gates are not operating according to their intended purpose, function, task, assignment, mission or job. So in a literal, common sense meaning of the word, that's a malfunction.

Now certainly one connotation of the word "malfunction" is that you have got a mechanical malfunction. But I would respectfully suggest to you that when people talk about a malfunction, they often -- and usually in my experience -- put the word "mechanical malfunction" to indicate that they are using that term to. mean some kind of condition of disrepair or mechanical

[p.13]

problem as opposed to a malfunction, which in effect undermines or negates the use, purpose, task, assignment, mission or job of whatever is being discussed.

And we respectfully, submit that Mr. Godshall points out the approaching train would have activated the gates. That's rather telling because the approaching train didn't, because, as we point out in our submission Mr. Emigh, who's the signal man that I recently deposed, points out that the three step sequence is very important to the intended design

or purpose or function or task or mission of the gate. And so when those gates are down for an extended period of time, they can't perform the intended function. And in that literal sense they are-. malfunctioning.

It seems to me that the regulations only come in to play -- and I should point out parenthetically that they were enacted after this collision -- but they come in to play in the sense that they would, as I remember, clearly would define the situation we have here as a false activation or a malfunction of the gates. It just simply confirms what we think is self-evident from the facts here.

And so we aren't suggesting that we should be allowed to waive the regulations in front of the jury,

[p.14]

that would be a retroactive application of those regulations. We merely are using those to support our basic contention regarding that the gates were in fact malfunctioning for the reasons that I've stated.

MR. HIMMELSPACH: Judge, if I may. I just want to clarify a possible point of confusion.

I disagree with Mr. Murray in his description of what the present regulations would require, that those would be a malfunction under these new regulations. This was a new train operation and the new regulations specify that the alternate warning requirements under the new regulations would not apply under this circumstance. And this is-why we are concerned about the use of the word "malfunction" in the

trial. That would suggest, had these regulations been in effect, Conrail would have been required to take the measures that are described in the new regs.

THE COURT: I don't suppose anybody is going to bring up the fact of the new regulations, are they?

MR. MURRAY: No, that's correct, your Honor.

And Tom, I'm sure your Honor understands that I disagree, we have a disagreement about whether or not this should be considered normal train operations. I mean, I hope Conrail isn't saying it's normal in their operations to have stopped equipment, stopped trains activating these

[p.15]

gates for an extended period of time. That just strikes me as astonishing.

MR. HIMMELSPACH: It is not simply my opinion or Conrail's, Mr. Murray. We provided the court with a copy of the Federal Railroad Administration Rule and interpretation that says it shall not be considered interference if a train is standing on an approach circuit waiting for a signal indication or authority for movement.

This is not Contrail's idea, it is not my idea, this what the Federal Railroad Administration has said in interpreting, this rule.

And the section from the CFR that you quoted, Mr. Murray, at page 5 of your brief, you left out the preceding

sentence which says, "Normal train movements or switching operations are not considered to be interferences with the warning system operations."

MR. MURRAY: Well, I'm -

MR. HIMMELSPACH: I'm sorry, we shouldn't confuse the court on this point. It's rather clear. And when the Federal Railroad Administration promulgated these regulations, they did not want to impose on railroads the responsibility of providing alternate warnings every time you have a switching operation, every time you have a train stopped for an approach. This is a policy, policy determination by the FRA.

[p.16]

THE COURT: Well, they haven't overcome the rules of negligence, have they? I mean, this is still a negligence action.

MR. HIMMELSPACH: It's certainly a negligence action, judge. Had this accident happened after the effective date of the regulations, however, these regulations would preempt state law on this issue by an expressed provision in the new regulations.

MR. MURRAY: It seems to me, Tom --

THE COURT: I don't know why I have to be caught up in controlling the use of the word "malfunction". It seems to me that the art of cross examination is still alive and well, and that to the extent that the defendants'-- if plaintiff's people use the word "malfunction" or something to describe -- in

what is an attempt to describe the situation that existed there, they should be permitted to do so. And to the extent you want to cross examine them and to say: Do you have any claim that the system was in disrepair or broken or not functioning, that seems to me they are going to say no, we don't have such a claim.

The issue in my mind is still fairly simple here, and that is what is the duty of the railroad, if any, in this situation?

I've concluded that your motion for summary

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judgment fails and it's a negligence action, and we'll try it as a negligence action. And I have a real problem with getting caught up in the semantics of your various positions.

You obviously don't want to stipulate what they mean by the use of "malfunction" or "false activation," you don't want to engage in that stipulation in return for a stipulation that the gates and lights were not in disrepair, neglected or broken down.

I gather you don't want to do that.

MR. HIMMELSPACH: We cannot agree it is a malfunction or false activation.

THE COURT: I'm not suggesting that you are. I'm suggesting that the stipulations say when they use that word that's what they mean. It's for the jury to decide whether to

accept, reject, believe, or whatever, with respect to those two characterizations. And I suppose I could give them an instruction to that effect.

MR. GODSHALL: I'm willing to work with Mr. Murray on that language, that's not it. We are very concerned about the regulations and the use of the term "malfunction" as a term of art.

THE COURT: I'm not going to give them a copy of the regulations.

MR. GODSHALL: I understand that. I just don't

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want other experts to come in and say malfunction, uh-huh, that takes us down another road.

MR. MURRAY: Conrail can be assured I'm not going to, by implication, statement, or any other way, suggest there is a mechanical malfunction case. That isn't the case. That just isn't my case.

MR. GODSHALL: We'll work on some language and propose it to Mr. Murray this afternoon by fax.

THE COURT: All right.

MR. HIMMELSPACH: One final point. Can we get an agreement there will be no use of these regulations in the trial?

MR. MURRAY: I have no in intention whatsoever to get into the regulations, for reasons I've said in the brief.

MR. GODSHALL: Okay.

THE COURT: Another motion that was filed, it's docket number 69, is an order preventing the plaintiff from presenting any evidence or stating by question or comment to the jury that the signal system was in any way inadequate. And the position of Conrail is anchored the federal regulation, I think it's actually in the Federal Railroad Safety Act 49 USC, Section 201.06, which was formerly 45 USC 434.

And that takes us then to 23 CFR 646.214 paren

[p.19]

(B) paren (3) paren, which talks about adequate warning devices. And my reading is that the Federal Railroad Safety Act permits the states to adopt more stringent safety requirements when they are, quote, "necessary to eliminate or reduce a local safety hazard."

In my view, this is a question of fact as to whether their crossing constituted a local safety hazard and whether the warning system was adequate. And as a consequence, I'm going to deny the defendant's motion with respect to that motion, which is this is docket 69.

I'm not sure you have got the docket numbers but it's styled, "Defendant's Motion In Limine, re: Evidence or Comment that the Warning System was Inadequate."

The defendant also seeks to exclude the report of the Public Utilities Commission on the railroad information system accident complaint and inspection data at selected crossings, the PUCO investigation report on the subject accident containing photographs, the United States Department of Transportation Crossing Inventory Report, and the US DOT Railway Grade Crossing Accident Incident Report for the subject accident.

The plaintiff's brief points out that the defendant's exhibit list includes Exhibit U-l-5, which also appears to fall within the purview of this statutory

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prohibition or use.

MR. HIMMELSPACH: Judge, that document is a Public Utilities Commission Track and Structure Inspection Report which is not part of the process of identifying hazard locations for upgrades of warning systems. It's a report that's prepared by the PUCO where they check the trackage, the vegetation, the timber, and so forth. It's not a report used for purposes described under 234.09.

MR. MURRAY: Judge, I have no reason to dispute that. I just took it on its face, it looked to me like it was the same kind of animal that you complained about in mine, but I really think this is an academic issue. We are not going to use any of that. None of our experts are going to use that.

THE COURT: Any of these matters?

MR. MURRAY: No.

THE COURT: What about the photographs?

MR. MURRAY: Well, we have our own photographs.

THE COURT: Were there photographs of the accident itself?

MR. MURRAY: Not that I'm aware of.

MR. HIMMELSPACH: No, I think they were post-accident photographs, judge.

MR. MURRAY: I'm not aware of that.

MR. HIMMELSPACH: At the crossing.

* * *

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Firstly, you have a situation where you have got a stopped train that has activated gates; that's the first similarity.

Secondly, you have a busy thoroughfare, so you have got cars going over the crossing.

Thirdly, you have the crew of the stopped train in a position where they observe this fact.

Fourthly, nobody goes to the crossing to protect the crossing, so you have got nobody at the crossing.

Fifth, this is a multi-track crossing.

Sixth, you have high speed trains coming, and you know they are coming. They are scheduled to arrive.

And so you have got, we contend, the identical situation. The only difference is the train came from the opposite direction.

Now I don't want to get into the real specifics, but I can tell you in this case there is going to be a strong suggestion -- and you have already probably seen it in our submissions -- that people going over the crossing in this situation, and some of the people that did that night will say that their attention was focused on the stopped train.

And in the Wightman situation the drivers were all focused on the stopped train. But the stopped train

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was an obstruction to the train that struck the Wightman girl; the two kids that were killed in that case.

THE COURT: Well, it sounds to me that the Wightman case, if I can use the word egregious, is certainly, is egregious compared to this case, in the sense the train is coming out from behind a stopped train.

MR. MURRAY: I think that would be Conrail's position. But my position would be, in this situation we have at the Back Orrville Road Crossing, is more egregious because in the Wightman case you had an unexpected stop.

An air hose broke and the crew was in a dilemma, should we go protect the crossing or fix the train; they did nothing.

In this case, we are going to show that we had a train, that trains were stopped at this crossing on a regular basis that created this situation, and for at least 14 months prior to this collision you had this same situation existing on a regular basis.

So you have crews stopping. They know trains are coming from the opposite direction. You have a sharp curve there. We are going to be able to show that in order to even see a train coming from your left, a driver has to turn, your Honor, about a 140 degrees in his seat just to see over, because of the extreme angle to the left at that particular crossing.

* * *

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THE COURT: Excuse me for interrupting.

MR. MURRAY: Well, excuse me, but the point I would like to ask you to ponder is this:

In a comparative negligence case it's not just the quantity of the points made by each side but it the quality of the negligence, or indeed the conscious disregard, which the jury is entitled to weigh in the ballot, in deciding where, how the fault should be apportioned.

Now I think it's virtually certain the jury's going to apportion some fault to Scott Jones, I don't question that. As

a matter of fact, I'll doubt if I even object to that. We can argue that some fault should be assessed to him. But it seems to me that if we can show that this railroad, Conrail, had long-standing knowledge of the risk that this practice posed to motorists, that motorists would proceed over the crossing, and they had a five year opportunity to do something about it, that goes to the quality of the failure of the railroad to exercise due care to do the preventive things that we are arguing.

And that it would be unfair, because Jones comes down the road, he's got maybe 30 seconds to make a judgment about whether to go over the crossing or not. We are prepared to show that this railroad has known that for at least five years, that in this situation you are going

[p.37]

to have traffic proceeding over the crossing. And indeed this is one example, just one example that I'm aware of, of the terrible dangers that this practice of having gates down for a long time creates.

THE COURT: Anything further you want to offer on the Wightman case issue?

MR. HIMMELSPACH: Judge, just one point.

We have identified, among the exhibits that we reserve the right to introduce, the engineer and train man examinations that Conrail has given to its crews after the Wightman accident in anticipation that this could become an issue.

What I see happening is if the Wightman case comes to the jury, then we are going to be defending actually two cases: What we did in response to Wightman, in addition to what we instruct our crews with respect to the conditions that were at the Back Orrville Crossing. I think they are two different circumstances. We have different rules that apply to each situation. And I think it would be very confusing for the jury to separate those two circumstances.

THE COURT: Mr. Murray, in your presentation, where do you perceive that Berg will come? Early? Toward the latter part of the case?

MR. MURRAY: Well, I could -- it would be

* * *

[p.42]

theirs.

But we anticipate the defendant will suggest or may want to suggest to the jury, through counsel or through witnesses, that simply because Mr. Jones went around the gates he broke the law. We would object to any suggestion --

MR. GODSHALL: That's correct, we will.

MR. MURRAY: We would object to any such suggestion, because it seems to me that we have a fact question here, whether under these circumstances a reasonably prudent person would go around the gates. And it just seems to me to fly in the face of all common sense if in fact 99 percent, or the overwhelming majority of people go

around the gates under these circumstances, it seems to me almost a contradiction in terms that everybody who goes around the gate under every circumstance is automatically a law breaker.

It seems to me that's a fact question for the jury, whether or not under all these circumstances going around these downed gates is negligence.

Now, the question, the real question in this is whether he looked effectively when he went up there, not whether he looked around the gates. And for them to get up and say he broke the law, he broke the law, is fundamentally unfair, and we think it's wrong, as a matter

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of law. What we have under these circumstances is a fact. If 99 percent of the people are going around the gates, what they are saying is 99 percent of the people act unreasonably and violate the laws under these circumstances.

If it's unfair if they create a situation -- let me take it, just to get the objection.

Suppose these gates and lights had been down for two weeks and were broken, and somebody comes along and goes around those gates. Are they entitled to say, regardless of how long. those gates are down, two weeks, two months, two hours, doesn't make any difference. If you go around those gates you broke the law, you are guilty of negligence as a matter of law?

It strikes me that that is fundamentally unfair and fundamentally wrong for them to get up and make that claim here, we think would be highly prejudicial. And what we would like an opportunity to do is submit in writing, if necessary, a motion in limine to bar them from suggesting just because he went around the gates he was negligent and broke the law.

That doesn't bar them from saying going around the gates is negligence, but we suggest that they should be barred from suggesting going around the gates automatically means he violated any particular statute of

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the law, unless the court holds that that statute is there and regardless of all the circumstances, anybody that drives around those gates, under any and all circumstances, is automatically guilty of a violation of that statute.

You have a malfunctioning -- we are going -- our basic approach here, as Doug knows, is going to be to show that people act in this situation exactly as they act when, for example, they come to an intersection where a red light is broken and the red light is on. And you are not supposed to go through a red light, but suppose a red light on a major highway is broken and it's there, it's on red for 15 or 20 or 30 minutes?

Well, does that mean if a person treats it as a stop sign rather than red light they are automatically guilty of going through a red light? It strikes us as fine

THE COURT: Well, isn't there -- if I can remember my tort law from way back-- that if you violate a law, it is considered to be negligence? What's the --

MR. GODSHALL: Per se?

MR. MURRAY: Per se?

THE COURT: Yes. And I don't know what the law is with respect to the situation that you described where there is a breakdown in the signal system or in an

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apparent explanation for the operation of the signal system that leads people to, quote, break the law, whether or not that remains negligence per se or not. I don't know what the answer to that is.

MR. MURRAY: Would your Honor be willing to wait until we have the case in? I mean, he can certainly argue it, if your Honor is convinced at the appropriate time, after you have heard all the evidence in the case.

MR. GODSHALL: We'll brief it before trial because I. feel very strongly, like any other traffic statue which is enacted by the state, it is negligence per se to go around the gates when you are forbidden to do so. It's very clear. If it's a rear end accident and you hit the rear end of the other car in front of you, you get a charge from the court the plaintiff is negligent per se -- the defendant is negligent per se. The issue is proximate cause, and damage is for you to resolve.

If you have a case where a person, a pedestrian, is walking across the street against a light and an accident happens, you get an instruction there is negligence per se. There may be other issues, maybe of a truck coming down the road that's overloaded in violation of state law, and there is an issue whether that truck is responsible.

THE COURT: I'll accept briefs on the issue.

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It seems to me the defendant should be allowed to argue that the plaintiff broke the law. It seems to me it becomes more of a question of instructions for the court to deal with as to how I treat that particular infraction. Because it -- it's not reasonable to say that you have to sit there for two months rather than break the law, or to go past something that isn't working, or go through the red light because it is red for all four intersections.
We have all had that situation where the lights just don't function and I don't know if there is any law in that area.

MR. GODSHALL: We don't have them sitting there for two months.

And I want to remind the court on top of the crossbuck is a sign that says "2 tracks", which was visible enough; or the entire plaintiff's case is premised on we only have a duty to look to the right because that's where the stopped train is.

MR. MURRAY: No, no.

THE COURT: I don't think that is his --

MR. MURRAY: That isn't our contention at all.

If I may just respond. The problem is if he gets up and suggests -- I think if he gets up and he says we contend he broke the law .But to say in a pontifical sense he broke the law, it seems to me, usurps your

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responsibilities.

THE COURT: How is that any different than you getting up and saying the railroad is negligent? I mean, it just seems to me it's just part of the give and take of the litigation,

MR. MURRAY: But I can't do that if I'm going to be proper. I can't get up and say they were negligent. I can get up and say I contend they are negligent.

MR. GODSHALL: I think that's a distinction without a difference. You. are going to say the railroad is negligent and had conscious disregard the whole time. And I can say this guy broke the law.

I think we both need to be careful. The judge will certainly remind us from the bench if we are impinging on his responsibility. We'll get cut off rather sharply without an objection.

MR. MURRAY: You put your finger on it, judge. If you decide after you pondered this that these gates, for all

practical purposes, were malfunctioning, then the question becomes if you have got malfunctioning gates and somebody goes around those malfunctioning gates, is that person acting reasonably or unreasonably? Now that's the question.

But to get up and say he broke the law is basically treating the court as a potted plant. Because

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you are basically saying you have got a book, legislation which was obviously passed on the supposition the gates are going to be properly operating, not that they are going to be malfunctioning.

THE COURT: Well, I agree that anything that you say ought to be couched in terms, "it's the contention."

MR. GODSHALL: We believe the evidence will show that he broke the law.

I mean, I believe the evidence is going to show a lot of things and the jurors are going to tell us if we are right or wrong.

MR. MURRAY: If they start waiving the statute and say there is a statute that says you are supposed to stop when the gates are down, that seems to me is usurping your responsibilities. The question seems to me, if they are malfunctioning whether this statute applies.

MR. GODSHALL: We are going to present -- if we haven't already, I haven't reviewed the instructions -but I believe we

are presenting an instruction on the statute. And we don't want to give the court the impression that this is a case in which the jury can decide which laws they can abide by and which laws they can break. And that's certainly going to be subject to a lot of testimony. We are asking the court -- we'll be

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asking the court for guidance on that.

This is not a case where they were sitting there for two hours or two days waiting for something to happen.

MR. MURRAY: All we are asking is that the defendant not be allowed to usurp the court's responsibility at this point.
THE COURT: I think we understand each other. I think that's all.

MR. GODSHALL: Thank you.

- - -

(Hearing concluded.)

CERTIFICATE

I, Richard G. DelMonico, Official Court Reporter in and for the United States District Court, for the Northern District of Ohio, Eastern Division, do hereby certify that the foregoing is a true and correct transcript of the proceedings herein.

/s/_____
Richard G. DelMonico,
Official Court Reporter
425 U.S. Courthouse
Two South Main Street
Akron, Ohio 44308
(330) 535-2280

APPENDIX X

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

REBECCA A. JONES, *Plaintiff*,	)	
	)	Judge David Dowd
v.	)	Akron, Ohio
	)	
CONSOLIDATED RAIL CORPORATION *Defendant*.	)	**Civil Action Number 5:94CV2021**

COLLOQUY OF COURT AND COUNSEL

Date: May 7, 1996

* * *

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THE COURT: Admitted.

MR. GODSHALL: We're offering R-1 through 11 which is the digital printout we used yesterday.

THE COURT: Admitted.

MR. GODSHALL: We're withdrawing all the rest of the exhibits with the exception of Y 1-38 the Digest of Motor Vehicle Laws by the Department of Public Safety.

THE COURT: Any objection?

MR. MURRAY: No objection.

THE COURT: All right. That's admitted.

MR. MURRAY: I'm sorry, Y-1 through 37. I object to 38, the book of laws.

THE COURT: Your objection is sustained.

MR. GODSHALL: There's the redacted police report. So if you wanted to check that, Tom.

THE COURT: Now you rest for the defendant?

MR. GODSHALL: I rest.

THE COURT: You rest for the plaintiff?

MR. MURRAY: Rest for the plaintiff.

THE COURT: Does the defendant or plaintiff-have any motions?

MR. MURRAY: The plaintiff moves for directed verdicts on the issue of Conrail's liability firstly. Secondly -- let me do that one first.

THE COURT: Denied. What's the next one?

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MR. MURRAY: I think that's about it.

MR. GODSHALL: I have a motion for directed verdicts on the issue of plaintiff's negligence.

THE COURT: The motion is granted. I'm going to instruct the jury that the plaintiff was negligent.

MR. GODSHALL: While we're on the record, there were some issues brought up with respect to instructions. It is my understanding --

THE COURT: Let's get the motions resolved first. Any other motions?

MR. GODSHALL: I want to move for a motion that the railroad is not negligent.

THE COURT: Denied.

MR. GODSHALL: I want to move for a motion for directed verdict on the plaintiff's conduct was of a reckless, wanton nature entitling defendant a judgment in its favor.

THE COURT: Denied. Now I think you have the jury charges but I will give you the updated version. Now let's show that the court had a conference with counsel regarding the jury charge during the noon hour and I believe that the defendant has several objections to the charge that you wish

to advance?

MR. GODSHALL: Tom.

MR. HIMMELSPACH: Judge, we would object to the

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failure of the court to submit to the jury the issue of the recklessness of the plaintiff.

We would object to the failure of the court to submit to the jury the issue of the recklessness of the plaintiff decedent Scott Jones as a bar to this action, specifically with regard to our proposed instruction No. 14.

THE COURT: The court has considered that and the motion is denied.

MR. HIMMELSPACH: We object also to those portions of the court's next instruction that what was page 11 --

THE COURT: I think it's still 11. I think it is the third paragraph, isn't it, on page 11? Do you have a copy?

MR. HIMMELSPACH: Page 11 at the third paragraph addressing the railroad's duty of care. We object to that instruction in that it does not address correctly the railroad's duty with respect to the allowable speed of the train and to the duty, the claimed duty of the railroad to install different warnings or active warnings at that crossing, specifically the motion sensor or grade crossing predictors.

THE COURT: That motion, that objection is denied. Anything else? I don't want to interrupt you. I think you covered everything, didn't you?

MR. HIMMELSPACH: I think so.

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THE COURT: Mr. Murray, do you have any objection to the charge?

MR. MURRAY: The only objection, I would like to make one last desperate attempt, conscious disregard, I would like just a moment to state --

THE COURT: I think that I really handled that when I granted summary judgment on the issue of punitive damages. I think its an issue resolved and to the extent that you want the court to reconsider that issue I have reconsidered it and I'm still not going to give the jury punitive damages

(Jury present.)

THE COURT: I want to go on the record if I can have counsel up for a moment. Let the ready show the jury has now been returned to the courtroom. We're ready to go to final argument but before I do that I'm going to give the jury the written charge and read the charge but then I want to review my instructions as to argument.

And Mr. Murray, you understand that you do not have the right to use more time in your closing than you do in your

opening. I have allowed an hour each side. So if you only use 25 in your opening you have 25 left.

Do you want me to tell you at any particular time in your argument how much time you used? I'll be glad to tell you at 30, 40, minutes, whatever.

APPENDIX Y

FEDERAL REGISTER
VOL. 59, NO. 189
RULES AND REGULATIONS

Department of Transportation
Federal Railroad Administration
49 CFR Parts 212 and 234

Grade Crossing Signal System Safety

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: FRA is issuing a final rule requiring that railroads comply with specific maintenance, inspection, and testing requirements for active highway-rail grade crossing warning systems. FRA is also requiring that railroads take specific and timely actions to protect the traveling public and railroad employees from the hazards posed by malfunctioning highway-rail grade crossing warning systems. This action is taken in part, in response to a statutory requirement that FRA "issue rules, regulations, orders, and standards to ensure the safe maintenance, inspection, and testing of signal systems and devices at railroad highway grade crossing."

EFFECTIVE DATE: These rules will become effective January 1, 1995.

Federal Register, Vol. 59, No. 189, Rules and Regulations

* * *

SUPPLEMENTARY INFORMATION: Background

Therefore, FRA is issuing these amendments to 49 CFR part 234 in which railroads are required to take certain steps when they are notified of either activations failures or false activations. These steps, designed to assure the safety of the traveling public and railroad employees, are not unknown to the railroad industry. They require the railroad to take the following three series of steps after learning of a malfunctioning warning system: (1) Notify trains and law enforcement authorities of the malfunction; (2) take appropriate actions to warn and control highway traffic pending inspection and repair of the system; and (3) repair the system.

The rules do not establish a specific time frame for repair of malfunctioning warning systems. Setting a specific repair time would necessitate establishing a schedule of various defects together with approved repair periods. Not only is a system of this type very cumbersome to establish and monitor, it would not take into consideration the operating environments of various railroads. Rather, safety is being maintained while the warning system is out of service by requiring an equivalent level of warning and protection. That safety level will be ensured by the flagging and speed restrictions contained in this rule.

Safety at active grade crossings will be further ensured by the maintenance, inspection, and testing requirements contained in this rule.

* * *

§ 234.105(c)

* * *

.... We note, however, that the requirement to flag a crossing during periods of malfunction, while not universal, is not new. Rule 138(c) of the Northeast Operating Rules Advisory Committee (NORAC) requires that if "crossing protection devices are not functioning properly * * * trains must approach the crossing(s) prepared to stop and not proceed until protection against highway traffic is provided by on-ground personnel."

* * *

. . . . Permitting a train to stop and then proceed through a crossing without a flagger and without properly functioning automatic gates and lights sends a confusing and potentially tragic message to a highway user. The highway user, seeing the train stop, may be encouraged to cross in front of the train thinking that he or she has the right of way.

* * *

Section 234.209 Interference with Normal Functioning of System

1. The proposed rule requires that the normal functioning of any system shall not be interfered with in testing or otherwise without first taking measures to provide for safety of highway traffic that depends on normal functioning of such system.

FRA requested that interested parties discuss the safety effect on warning systems caused by railroad equipment standing or being switched within the systems approach circuit where the warning system is not designed to accommodate those activities. FRA stated. "[t]here have been instances of such carts and locomotives activating the warning system for an extended length of time when there is no danger in crossing the tracks, raising the issue of credibility at that crossing.

2. If there are multiple tracks at the crossing, a warning system activated for a period of time due to standing equipment may effectively entice a highway user to cross the tracks, when in fact a train may be approaching on the other track. This situation may be exacerbated by reduced "visibility of the approaching train due to the standing equipment."

The ATA suggested that the rule be revised to prohibit railroad equipment from being left standing or switched at a crossing in a manner that interferes with the normal functioning of the warning system. Maine DOT noted that warning system activations due to switching activity and standing equipment within crossing circuitry can be alleviated by installation of motion sensing devices.

3. The labor/management group concurred in the rule as proposed and noted that most railroads have established procedures to be followed when testing or other work is performed near grade crossings. The group also notes that it would be "inappropriate" to allow excessive or continuous operation of warning devices while such work is being performed.

4. In response to FRA's question regarding the effect of switching operations and equipment standing near crossings, the group recognized that the issues presented are important but believe a "separate examination of the engineering and operating issues involved" to be more appropriate to determine if agency action is warranted. The group stated that "as FRA is aware, railroads cannot operate without conducting switching operations in the approaches of highway-rail crossings.

6. This is a normal part of railroad operations and there is no available technology which would completely eliminate the warning system activations which result from these operations."

FRA recognizes that normal switching operations will activate warning systems in many locations. We agree that there is no realistic means to prevent this from occurring at all locations.

7. However, standing equipment which is not involved in switching activities can be prevented from activating warning systems.

8. A warning system can be designed to accommodate trains, locomotives or other railroad equipment standing within the system's approach circuit. Motion detectors, time-out circuits, and similar technology can accommodate a railroad's operational needs while retaining a credible, functioning warning system at a nearby crossing.

9. If such technology is not in place, a railroad must take measures to prevent activation of the nearby warning system.

Many railroads presently have operating rules prohibiting just such a result. Rule 103(D) of the General Code of Operating Rules provides that "automatic crossing signals must not be actuated unnecessarily by open switch or permitting equipment to stand within the controlling circuit." Similarly, NORAC Rule 138(b) provides that to "* * * avoid unnecessary operation of automatic highway crossing protection * * * {E}ngines or cars must not be allowed to stand longer than necessary."

FRA is therefore revising this section to provide that interference with normal functioning of the warning system includes trains, locomotives or other railroad equipment standing within the system's approach circuit where the warning system is not designed to accommodate those activities. Normal train movements or switching operations are not considered to be interference with the warning system operations. This revision is directed to situations such as when a car or other rail equipment is set out on an approach circuit thereby activating the warning system. If the warning system at that crossing is equipped with a time-out circuit, cut-out circuit, motion detector, or motion sensor, the system will deactivate, permitting traffic to proceed through the crossing. This provision affects operations at those crossings not so equipped. Standing railroad equipment not involved in active switching will not be allowed to keep a warning system activated.

APPENDIX Z

CODE OF FEDERAL REGULATIONS
(23 CFR CHAPTER 1)
FEDERAL HIGHWAY ADMINISTRATION, DOT

SUBPART B - Railroad - Highway Projects

§646.200 Purpose and applicability.

(a) The purpose of this subpart is to prescribe policies and procedures for advancing Federal-aid projects involving railroad facilities.

§646.204 Definitions.

For the purposes of this subpart, the following definitions apply:

(i) *Passive warning devices* means those types of traffic control devices, including signs, markings and other devices, located at or in advance of grade crossings to indicate the presence of a crossing but which do not change aspect upon the approach or presence of a train.

(ii) *Active warning devices* means those traffic control devices activated by the approach or presence of a train, such as flashing light signals, automatic gates and similar devices, as well as manually operated devices and crossing

watchmen, all of which display to motorists positive warning of the approach or presence of a train.

§646.214 Design.

3(i) Adequate warning devices, under §646.214(b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:

(A) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

(C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.

(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of school buses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.

(F) A diagnostic team recommends them.

APPENDIX AA

CODES OF FEDERAL REGULATIONS
(49 CFR CHAPTER II)
FEDERAL HIGHWAY ADMINISTRATION, DOT

SUBPART A - General

§234.1 Scope.

This imposes minimum maintenance, inspection, and testing standards for highway-rail grade crossing warning systems. This part also prescribes standards for the reporting of failures of such systems and prescribes minimum actions railroads must take when such warning systems malfunction. This part does not restrict a railroad from adopting and enforcing additional or more stringent requirements not inconsistent with this part.

§234.4 Preemptive effect.

Under 49 U.S.C. 20106 (formerly §205 of the Federal Railroad Safety Act of 1970 (45 U.S.C. 434)), issuance of these regulations preempts any State law, rule, regulation, order, or standard covering the same subject matter, except a provision directed at an essentially local safety hazard that is consistent with this part and that does not impose an undue burden on interstate commerce.

§234.5 Definitions.

As used in this part:

"Activation failure" means the failure of an active highway-rail grade crossing warning system to indicate the approach of a train at least 20 seconds prior to the train's arrival at the crossing or to indicate the presence of a train occupying the crossing, unless the crossing is provided with an alternative means of active warning to highway users of approaching trains. This failure indicates to the motorist that it is safe to proceed across the railroad tracks when in fact, it is not safe to do so.

. . .

"False activation" means the activation of a highway-rail grade crossing warning system caused by a condition that requires correction or repair of the grade crossing warning system. (This failure indicates to the motorist that it is not safe to cross the railroad tracks when, in fact, it is safe to do so.)

. . .

"Partial activation" means activation of a highway-rail grade crossing warning system indicating the approach of a train, however, the full intended warning is not provided due to one of the following conditions:

(1) at non-gated crossings equipped with one pair of lights designed to flash alternately, one of

the two lights does not operate properly (and approaching motorists can not clearly see flashing back lights from the warning lights on the other side of the crossing);

(2) at gated crossings, the gate arm is not in a horizontal position; or

(3) at gated crossings, any portion of a gate arm is missing if that portion of a gate arm is missing if that portion normally had a gate arm flashing light attached.

. . .

SUBPART C - Response to Reports of Warning System Malfunction

§234.101 Employee notification rules.

Each railroad shall issue rules requiring its employees to report to persons designated by that railroad, by the quickest means available, any warning system malfunction.

§234.103 Timely response to report of malfunction.

(a) Upon receipt of a credible report of a warning system malfunction, a railroad having maintenance responsibility for the warning system shall promptly investigate the report and determine the nature of the malfunction. The railroad shall take appropriate action as

required by §234.207.

(b) Until repair or correction of the warning system is completed, the railroad shall provide alternative means of warning highway traffic and railroad employees in accordance with §§234.105, 234.106 or 234.107 of this part.

§234.105 Activation failure.

Upon receipt of a credible report of warning system malfunction involving an activation failure, a railroad having maintenance responsibility for the warning system shall promptly initiate efforts to warn highway users and railroad employees at the subject crossing by taking the following actions:

(a) Prior to any train's arrival at the crossing, notify the train crew of the report of activation failure and notify any other railroads operating over the crossing;

(b) Notify the law enforcement agency having jurisdiction over the crossing, or railroad police capable of responding and controlling vehicular traffic; and

(c) Provide for alternative means of actively warning highway users of approaching trains, consistent with the following requirements (see Appendix B for a summary chart of alternative means of warning):

(1)(i) If an appropriately equipped flagger provides warning for each direction of highway traffic, trains may proceed through the crossing at normal speed.

(ii) If at least one uniformed law enforcement officer (including a railroad police officer) provides warning to highway traffic at the crossing, trains may proceed through the crossing at normal speed.

(2) If an appropriately equipped flagger provides warning for highway traffic, but there is not at least one flagger providing warning for each direction of highway traffic, trains may proceed with caution through the crossing at a speed not exceeding 15 miles per hour. Normal speed may be resumed after the locomotive has passed through the crossing.

(3) If there is not an appropriately equipped flagger or uniformed law enforcement officer providing warning to highway traffic at the crossing, each train must stop before entering the crossing and permit a crewmember to dismount to flag highway traffic to a stop. The locomotive may then proceed through the crossing, and the flagging crewmember may reboard the locomotive before the remainder of the train proceeds through the crossing.

(d) A locomotive's audible warning device shall be activated in accordance with railroad rules

regarding the approach to a grade crossing.

§234.107 False activation.

Upon receipt of a credible report of a false activation, a railroad having maintenance responsibility for the highway-rail grade crossing warning system shall promptly initiate efforts to warn highway users and railroad employees at the crossing by taking the following actions:

(a) Prior to a train's arrival at the crossing, notify the train crew of the report of false activation and notify any other railroads operating over the crossing;

(b) Notify the law enforcement agency having jurisdiction over the crossing, or railroad police capable of responding and controlling vehicular traffic; and

(c) Provide for alternative means of actively warning highway users of approaching trains, consistent with the following requirements (see Appendix B for a summary chart of alternative means of warning).

(1)(i) If an appropriately equipped flagger is providing warning for each direction of highway traffic, trains may proceed through the crossing at normal speed.

(ii) If at least one uniformed law enforcement

officer (including a railroad police officer) provides warning to highway traffic at the crossing, trains may proceed through the crossing at normal speed.

(2) If there is not an appropriately equipped flagger providing warning for each direction of highway traffic, or if there is not at least one uniformed law enforcement officer providing warning, trains with the locomotive or cab car leading, may proceed with caution through the crossing at a speed not exceeding 15 miles per hour. Normal speed may be resumed after the locomotive has passed through the crossing. In the case of a choving move, a crewmember shall be on the ground to flag the train through the crossing.

(3) In lieu of complying with paragraphs (c)(1) or (2) of this section, a railroad may temporarily take the warning system out of service if the railroad complies with all requirements of §234.105, "Activation failure."

(d) A locomotive's audible warning device shall be activated in accordance with railroad rules regarding the approach to a grade crossing.

SUBPART D - Maintenance, Inspection, and Testing

Maintenance Standards

§234.205 Operating characteristics of warning system

apparatus.

Operating characteristics of electromagnetic, electronic, or electrical apparatus of each highway-rail crossing warning system shall be maintained in accordance with the limits within which the system is designed to operate.

§234.207 Adjustment, repair, or replacement of component.

(a) When any essential component of a highway-rail grade crossing warning system fails to perform its intended function, the cause shall be determined and the faulty component adjusted, repaired, or replaced without undue delay.

(b) Until repair of an essential component is completed, a railroad shall take appropriate action under §234.105, Activation failure, §234.107, False activation of this part.

§234.209 Interference with normal functioning of system.

(a) The normal functioning of any system shall not be interfered with in testing or other wise without first taking measures top provide for safety of highway traffic that depends on normal functioning of such system.

(b) Interference includes, but is not limited to:

(1) Trains, locomotives or other railroad equipment standing within the system's approach circuit, other than normal train movements or switching operating, where the warning system is not designed to accommodate those activities.

(2) Not providing alternative methods of maintaining safety for the highway user while testing or performing work on the warning systems or on track and other railroad systems or structures which may affect the integrity of the warning system.

§234.225 Activation of the warning system.

A highway-rail grade crossing warning system shall be maintained to activate in accordance with the design of the warning system, but in no event shall it provide less than 20 seconds warning time for the normal operation of through trains before the grade crossing is occupied by rail traffic.

APPENDIX BB

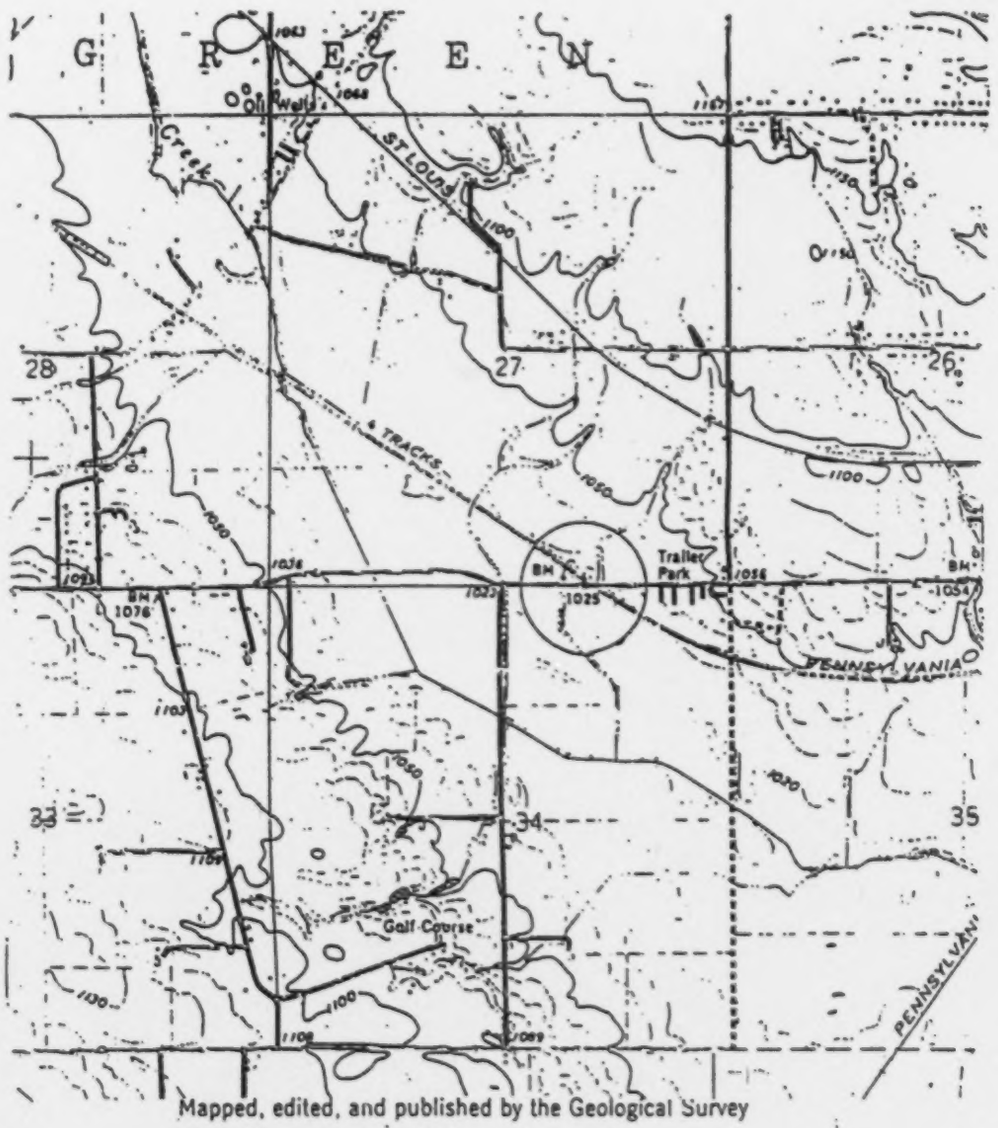
UNITED STATES DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY MAP OF ORRVILLE, OHIO

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY

ORRVILLE, OHIO

N4045—W8145/7.5

1961
PHOTOREVISED 1978
AMS 4665 IV SE—SERIES V85



Mapped, edited, and published by the Geological Survey

Control by USGS and USC&GS

Topography by photogrammetric methods from aerial photographs taken 1960. Field checked 1961

Polyconic projection. 1927 North American datum
10,000-foot grid based on Ohio coordinate system, north zone
1000-meter Universal Transverse Mercator grid ticks,
zone 17, shown in blue

Fine red dashed lines indicate selected fence and field lines where generally visible on aerial photographs. This information is unchecked

Red tint indicates area in which only landmark buildings are shown

Entire area lies within Congress Lands north of the Old Seven Ranges Land lines based on the Ohio River Base

SCALE 1:24 000

1 0 1 MILE
1000 0 1000 2000 3000 4000 5000 6000 7000 FEET
1 .5 0 1 KILOMETER

CONTOUR INTERVAL 10 FEET
NATIONAL GEODETIC VERTICAL DATUM OF 1929

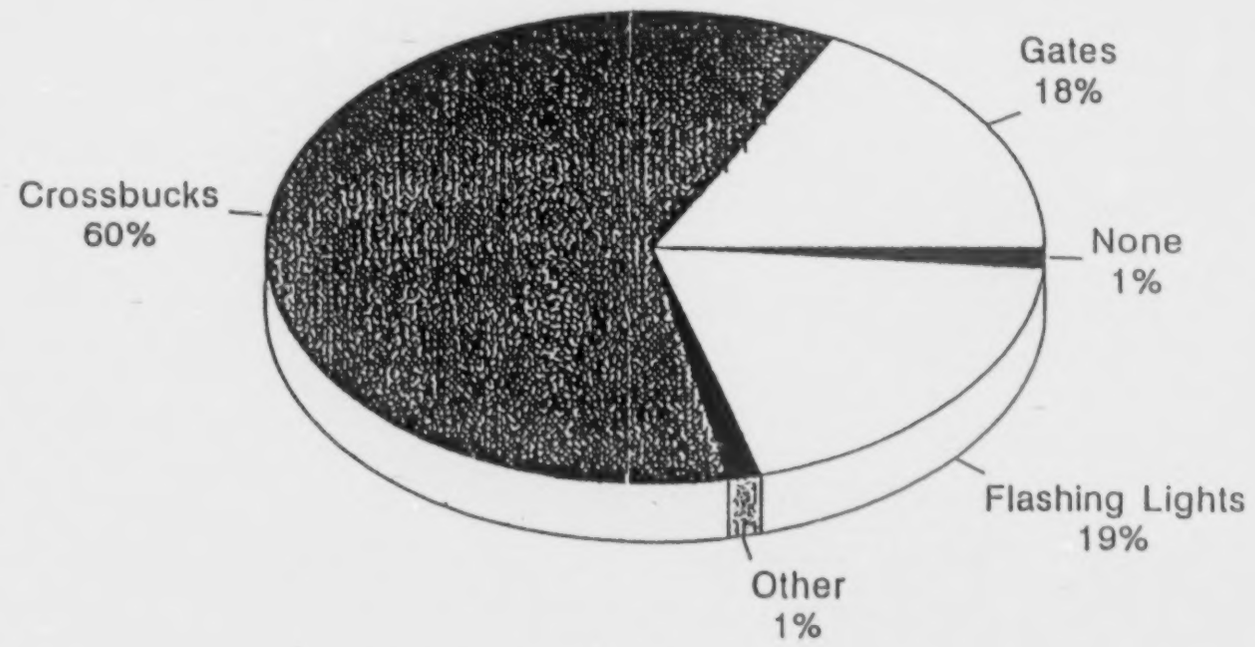
BEST AVAILABLE COPY

APPENDIX CC

PIE CHART OF TYPES OF WARNING DEVICES AT CRASHES

TYPES OF WARNING DEVICES AT CRASHES

1994 RAILROAD STATISTICS



The Public Utilities Commission of Ohio

APPENDIX DD

T&E COMBINED ROAD TIMESLIPS -
JOSEPH RUSSELL & JOHN LANDIS

AD 8023 R2 7-92

T & E combined road timeslip

CONRAIL

DOCUMENT NUMBER

PLACE FIRST WENT ON DUTY: Crestline Ohio

PLACE FINALLY WENT OFF DUTY: Conway Pa.

DIVISION: Pittsburgh

POOL	TRAIN SYMBOL	ROAD ROUTE	CLASS OF RATE	Col	MAXIMUM # OF CARS HANDLED	CLAIM LOCAL FREIGHT	ALLOW CODE	PURPOSE CODE	TYPE OF SERVICE	WORK ORDER NO.	COST CENTER NO.	DATE ON DUTY MO.	DAY	YEAR
576	INPI-7		1	1	130				2			02	07	89

	LENGTH OF TIME OFF DUTY PREVIOUS TO THIS TRIP	POSITION	EMPLOYEE #	INITIALS F M	LAST NAME	HOW PAID	ACTUAL MILES RUN	ON DUTY HRS	ON DUTY MIN		OFF DUTY HRS	OFF DUTY MIN		TOTAL ELAPSED TIME HRS	TOTAL ELAPSED TIME MIN	TOTAL TIME UNDER HOURS OF SERVICE LAW HRS	TOTAL TIME UNDER HOURS OF SERVICE LAW MIN
	24:+	C	424030	JD	Russell CONDUCTOR	1	169	02	10	R	02	30	A	12	26	11	55
	08:+	E	684504	JJ	Landis ENGINEER	1	169	02	10	R	02	30	A	12	20	11	55
	:+	B			BRAKEMAN					M			M				

	UNIT RR	LOCO #	EXCHANGE FOR UNIT	MILES
1		15554		1690
2		16427		1680
3		16411		
4				
5				
6				
7				
8				
9				
10				
11				
12				

CHECK PROPER BOX — RECREW 1. ☐ OUTLAW 2. ☐

TIME RELIEVED HRS: 02 MIN: 05 A

DEADHEAD MILES: 0050

PREVIOUS TRIP

	POSITION	POOL	MO.	DAY
1				
2				
3				

DEADHEAD SERVICE TO / FROM

INITIAL TERMINAL DELAY

	YARD ROUTE #	TIME ENGINE READY TO LEAVE ENGINEHOUSE HRS	MIN		FREE TERM TIME HRS	MIN	TIME LEFT YARD TRACK HRS	MIN		TIME CLAIMED HRS	MIN	ALLOW CODE
TRAIN				M	11	50	03	50	P	00	25	
ENGINE				M					M			

FINAL TERMINAL DELAY

	YARD ROUTE #	FREE TERM TIME HRS	MIN	TIME ENGINE REACHED FINAL TERMINAL DELAY POINT HRS	MIN		TIME CLAIMED HRS	MIN	ALLOW CODE
TRAIN						M			
ENGINE						M			

CONSTRUCTIVE ALLOWANCES — TRAIN CREW ONLY

ALLOW	DIS-ALLOW	APPLIES TO	CLAIM CODE	HRS/MILES	WORK ORDER NO.	COST CENTER NO.
		CB	381	2:88		
		CB	345	02:00		
		CB	778	01:48		
		CB				
		CB				

CONSTRUCTIVE ALLOWANCES — ENGINE CREW ONLY

ALLOW	DIS-ALLOW	APPLIES TO	CLAIM CODE	HRS/MILES	WORK ORDER NO.	COST CENTER NO.
		E	425	2:88		
		E	345	02:00		
		E	085	00:15		
		E	778	01:48		
		E				

I CERTIFY THIS TIME IS CORRECT — ENGINEER: C.A. Landis

I CERTIFY THIS TIME IS CORRECT — CONDUCTOR: A.D. Russell

PLAINTIFF'S EXHIBIT 21 5:94-CV-2021

APPENDIX EE

PLAINTIFF'S EXHIBIT 22
DELAY REPORT

DELAY REPORT (See Instructions 6 and 7)				REMARKS (See Instructions 3 and 4)
PLACE	DURATION OF DELAY: TIME BEGAN	DURATION OF DELAY: TIME ENDED	CAUSE OF DELAY	
Crestline	2 10 pm	3 50 pm	In Loc- because of middleton	
			Rd. 1.5 miles out & 1.5 miles	
			back	
Big Run	5 25 p	5 50 pm	Put Worcester Local's Power on	
			To Rail to Orville	
Orville	5 50 p	7 30 pm	Cut off Worcester Local	
Mace	8 07 p	9 45 p	Helper - Train in Emergency	
Morado	12 35 a	2 05 a	D.T. Line	
Conway	2 30 a	2 30 a	Arr - Time slip left	

PLAINTIFF'S EXHIBIT
22
5:19-CV-30131

FOLD LINE

DETAILS OF SERVICE (See Instruction 9)

TRAIN NO.	ENGINE *E-ENGINE *D-DIESEL ELEC. ED*	NUMBER	UNIT	CLASS	DEPARTURE: STATION OR PLACE FROM	DEPARTURE: TIME WENT ON DUTY	DEPARTURE: TIME TRAIN DEPARTED	ARRIVAL: STATION OR PLACE TO	ARRIVAL: TIME TRAIN ARRIVED	ARRIVAL: TIME WENT OFF DUTY	TERMINAL ROUTE NO.	MILES ACTUALLY RUN	KIND OF SERVICE (SEE INSTRUCTION 8)	PICK-UP AND DROP
I		5534	CR		Crest.	2 10 P M	3 50 P M		M	M		1		
N		6427	CR			M	M		M	M		1	Thru Frt.	
P		6411	CR			M	M		M	M		6		
I						M	M		M	M			Service	
						M	M		M	M		9		
7						M	M		M	M				
						M	M	Conway	2 30 A M	2 30 A M				

ROAD FREIGHT

CLASS OF RATE	HOW PAID
1 — Thru Freight 2 — Local Freight 3 — Traveling Shifter (5 day) 4 — Traveling Shifter (6 day)	1 — Conductor 1 — Engineer 2 — Brakeman 2 — Reserve Engineer 4 — Conductor Yard Rate 5 — Brakeman Yard Rate

TYPE OF SERVICE

2 — Freight
4 — Trail Van Trains

CLAIM DETAIL (See Instruction 10)

	REGULATION
Out of Train Service at	
2 05 a.m. at Morado 11 hrs 35 min	

F.R.A. INSTRUCTIONS

1. This report shall be rendered for all Road Crews. Engineers, Reserve Engine Employees, Conductors, and trainmen shall use this form when reporting individually. The report shall be rendered and signed by the conductor of the crew. If there is no conductor it shall be rendered and signed by the ranking employee whose time is reported thereon. Reports shall be numbered consecutively for each month beginning with number 1.
2. The report shall be dated as of the date on which the employee first goes on duty.
3. Under "Remarks" shall be shown any irregularities of the hours of duty. If an employee is released from duty for any period between the time of first going on duty and the time finally relieved from duty, such fact must be shown under "Remarks", giving the place at which the release is given, the time at which it began and the time at which it ended. Time off duty for meals taken by yard crews shall be shown in the space provided.
4. If the whole or part of service is deadheading the place and time at which the deadheading began and ended, and the train on which the employee deadheaded and whether or not the deadheading was before service or to the point of final release will be shown. When a crew or employee is relieved before the completion of the trip the name of the engineer and conductor of the crew relieving, or the name of the employee relieving will be shown.
5. Whenever time is shown A.M. or P.M. shall be given.
6. In reporting delays the cause of each delay, the place at which it occurred, the time it began and the time ended shall be given. Delays due to different causes shall be shown separately.
7. Delays to freight trains of less than 10 minutes at any one place need not be shown.

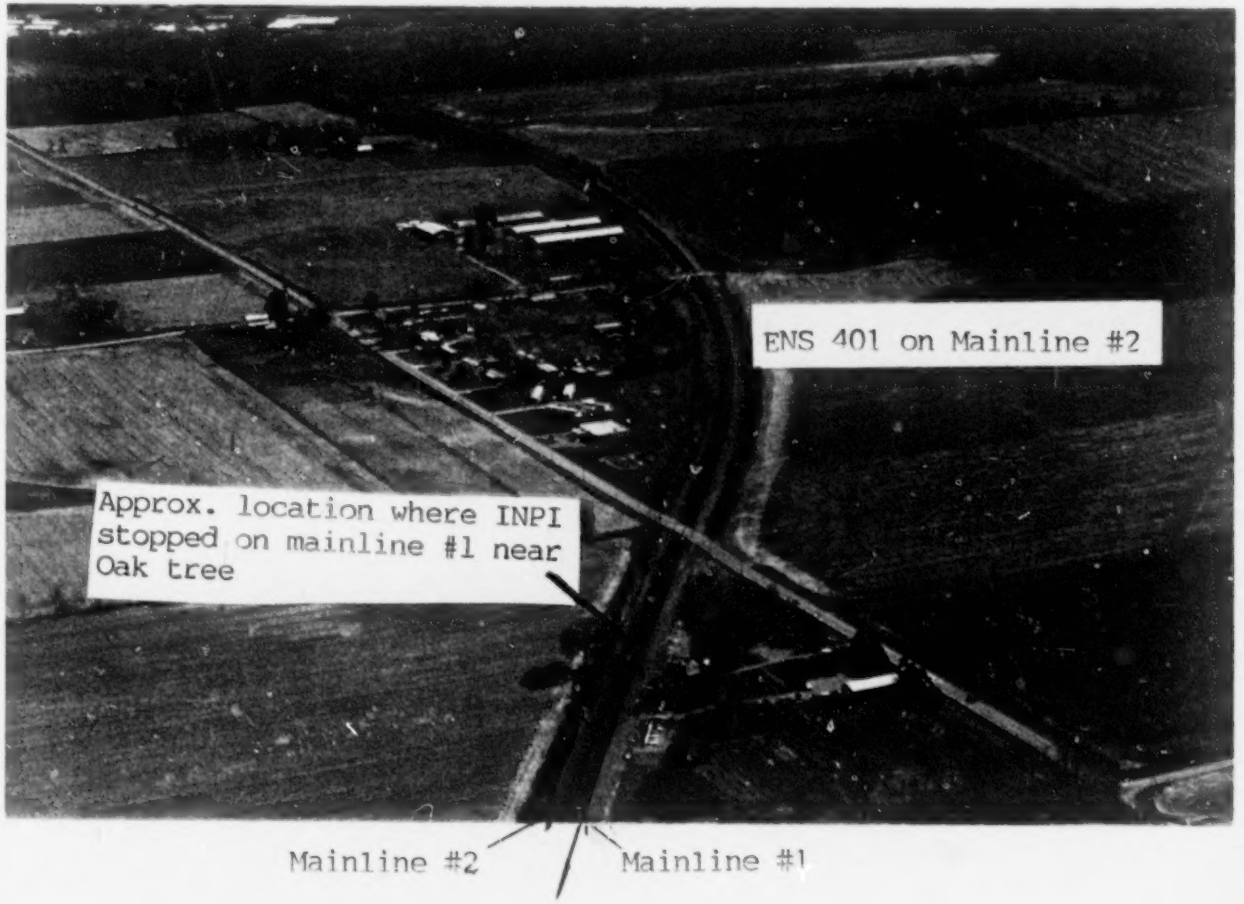
R.R. INSTRUCTIONS

8. Report "Kind of Service" as follows: Through Freight, Local Freight, Pick-Up & Drop, Mine Run, Special Freight, Work Train, Wreck Train, Helping Freight, Mixed Train, Deadheading, Etc.
9. When movements are made over more than one Operating Division of Railroad, the Junction point and the time passing the Junction must positively be shown under "Detail of Service". All movements made beyond switching limits must be clearly shown under "Details of Service" with the time leaving switching limits and the time returning to such switching limits.
10. All time claims must be shown on face of report. Service for which additional payment is claimed must be fully explained. Specific regulation(s) on which claim is based must be shown along with name and title of person authorizing.
11. TOTAL TIME ON DUTY — Show the actual time on duty applicable to the Hours of Service Act.
12. Report same time zone for entire tour of duty.
13. Report pick-up and drop stops in accordance with the Pick-Up and Drop regulation.

BEST AVAILABLE COPY

APPENDIX FF

AERIAL PHOTOGRAPH OF ACCIDENT
WITH MARKINGS


E
S
W
N
ENS 401 on Mainline #2
Approx. location where INPI stopped on mainline #1 near Oak tree
Mainline #2
Mainline #1

APPENDIX GG

CASE NO. 96-3828

FILED
FEB 7, 1997
LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REBECCA JONES, EXECUTRIX OF THE ESTATE OF
SCOTT R. JONES, DECEASED,
Plaintiff-Appellant,

v.

CONSOLIDATED RAIL CORPORATION,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Ohio
Eastern Division

FINAL BRIEF OF APPELLEE

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Attorneys for Defendant-Appellee
Consolidated Rail Corporation

Excerpts [pgs. 26-29, 42-44]

. . .

[26]

of the crossing, and plaintiff's argument of negligence per se is without precedent or merit.

D. The statute codified a general duty on Conrail to maintain its system as desired, and Conrail met that duty.

Plaintiff's argument is that Conrail violated a statutory duty under R.C. 4955.20 to keep in repair "good and sufficient crossings" by failing to have an active warning system at the Back Orrville Rd. crossing. The reasoning to this argument is that Conrail failed to meet its statutory duty because it did not have an active warning signal at the crossing and that it was required by federal law to have such a warning signal. Plaintiff is wrong on both points. Conrail did have an active warning at the crossing at the time of the accident, and there was no federal-law requirement that it

have any different kind of warning signal in place.

1. The signal system at the crossing was an active warning signal.

Plaintiff argues that an automatic-gate system at a railroad crossing is not an "active" warning system under the law unless it provides motorists with "a positive indication that a train is approaching." (See plaintiff's Brief at p. 28.) There is no support for that conclusion and such a conclusion

[27]

contravenes federal law.

An "active" warning device is defined in 23 C.F.R. 646.204(j) as follows:

> (j) *Active warning devices* means those traffic control devices activated by the approach or presence of a train, such as flashing light signals, automatic gates and similar devices, as well as manually operated devices and crossing watchmen, all of which display to motorists positive warning of the approach or presence of a train. [Emphasis added.]

A signal system that operates because a train is present is an "active warning device" under federal law. There is no basis to plaintiff's conclusion that such devices are "active" only if the motorist recognizes the device as signaling the immediate approach of a train his case, the automatic gates operated as designed, signaling the approach and presence of INPI-7.

This Court has considered arguments similar to that raised by Jones in two prior cases where plaintiffs alleged that the railroad breached a duty to provide "credible" warnings at active crossings. In *Ayoub v. National Railroad Passenger Corp.*, 76 F.3d 794 (6th Cir. 1996), the plaintiff's decedent, like Scott Jones, drove around traffic that was stopped at an automatic-gate crossing and was struck by a train. Plaintiff alleged that the railroad breached its duty to provide credible

[28]

warnings because the gate system had a history of malfunctions. The trial court dismissed the case on summary judgment, and this Court affirmed the dismissal, holding:

> "In short, we hold that evidence of prior malfunctions of warning signals at a railroad crossing is irrelevant so long as the signals functioned properly at the time of the accident." *Id.* at 796.

Similarly, in *Cox v. CSX Transp. Inc.*, NO. 88-6235, 887 F.2d 1086 (Table), 1989 WL 119375 (6th Cir. 1989), the plaintiff was struck by a train when he drove onto a crossing where flashing light signals were operating. Plaintiff alleged that the signals had lost credibility because of a history of malfunctions. The trial court excluded evidence of the alleged prior malfunctions, and the case was tried to a jury which returned a verdict for the railroad. This Court affirmed, holding that evidence of the prior malfunctions was irrelevant. Moreover, the Court ruled that even if the trial court erred in excluding the evidence, that error would be harmless. The Court held that the driver's duty to obey the warnings and to use caution applied whether or not he believed the warnings to be credible:

"Under the circumstances, we hold that the proffered evidence would not have been probative of a justification for Cox's actions."

[29]

"The *uncontradicted* evidence is that cox could have seen the train when it was 600 feet or more away and that he could have stopped his truck before he reached the rails."

The ruling below is consistent with the prior decisions of this Court. Plaintiff has offered no authority for her argument that an automatic-gate signal system is "inactive" or "disabled" because drivers do not believe the signals to be "credible." Jones cites to the decision in *Baltimore & P.R. v. Catharine Landrigan*, 191 U.S. 461, 48 L.Ed. 262, 24 S.Ct. 137 (1903), as support for her argument that motorists are free to ignore "nonfunctioning" railroad gates. That case involved a manual railroad gate that was left down at night over the roadway without an attendant. In that case, the designed control over the device -- the gateman -- was removed. That was not the situation at the Back Orrville Rd. crossing. Had the controls failed at the Back Orrville Rd. crossing, Conrail would have owed specific, duties under federal regulation to provide alternate warnings.[5]

In summary, Conrail had an active warning device at the crossing, as described by federal law, and plaintiff's argument to the contrary is wrong.

---

[5] See 49 C.F.R. Part 234, regarding Grade crossing Signal System Safety.

* * *

[42]

and the purpose of the Act is to protect railroad workers from injury by requiring the use of safe equipment. *Baltimore & Ohio R. Co. v. Jackson*, 353 U.S. 325, I *L.Ed.* 2d 862, 77 S Ct. 842, reheating denied, 354 U.S. 943, 1 L. Ed 2d 1542, 77 S Ct. 1391. Railroad crossing signal systems are not covered under the Act.

The doctrine has never been applied, by statute or common law, in the manner proposed by plaintiff here to require alternate warnings at gated railroad crossings. There is no precedent for plaintiff's proposal and no basis on which this Court should extend the doctrine of strict liability.

B Plaintiff's strict-liability theory is preempted under federal law.

Plaintiff asks the Court to announce a new rule of strict liability to govern railroad operations and to do so as a statement of public policy under authority of Ohio cordon law. Under plaintiff's proposed rule, railroads would be strictly liable for accidents occurring at active-warning crossings where the signal system is activated by standing railroad equipment. This Court cannot issue the proposed rule because the subject of that rule is covered by regulations issued by the FRA which preempt state authority.

On January 1, 1995, the FRA promulgated regulations defining the responsibilities of railroads at *crossings* where signal systems are activated by standing equipment.

[43]

Under 49 C.F.R. 234.209, the FRA required that railroads provide alternate warnings (such as slowing trains, contacting local law enforcement agencies, or sending flagmen to crossings} when standing equipment activates crossing signal systems. The FRA provided, however, that railroads were not required to provide those alternate warnings where signal systems are activated by trains engaged in normal train movements or switching operations. The regulation states:

> "49 C.F.R. 234.209
>
> (a) The normal functioning of any system shall not be interfered with in testing or otherwise without first taking measures to provide for safety of highway traffic that depends on normal functioning of such system. (b) Interference includes, but is not limited to:
>
> (1) Trains, locomotives or other railroad equipment standing within the system's approach circuit, other than normal train movements or switching operations, where the warning system is not designed to accommodate those activities." [Emphasis added.]

The FRA conducted a thorough review on this issue. The initial notice of proposed rulemaking was issued in June of 1992 (57 Fed. Reg. 28819). Written comments from the public were solicited and public hearings were held. The FRA determined that railroads are not required to provide alternate warnings

when signal systems are activated by standing equipment that is engaged in normal train movements.

Plaintiff seeks to have this Court change that regulation through the application of Ohio common law. The Court does not have that authority. Under the Federal Railroad Safety Act,[9] Congress gave the FRA exclusive authority over matters of railroad safety by declaring that regulations promulgated by the FRA preempt state authority over those subjects.[10] Since the FRA has covered the subject of the railroad's duty to provide alternate warnings at crossings where standing trains have activated the system in the course of normal operations, this Court, applying Ohio common law, cannot impose a different duty on railroads under those circumstances.

V. Did the trial court properly conclude that Scott Jones did not face a great probability of substantial harm at the Back Orrville Rd. railroad crossing when the crossing was closed to traffic by automatic gates and flashing lights and when the train, traveling with its horn blowing and alerting lights flashing, was visible to Jones before he drove around the gates and onto the crossing? (Relating to plaintiff's issue no. 5.)

---

[9] 49 U.S.C. 20101, *et seq.*

[10] 49 U.S.C. 40106 provides: "...A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement."

The last issue plaintiff raises is that the trial court erred in failing to submit her punitive-damage claim to the

* * *

APPENDIX HH

96-3828

FILED
FEB 6, 1998
LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REBECCA A. JONES EXECUTRIX OF THE ESTATE OF SCOTT R. JONES, Deceased Plaintiff	) Case No. 5:94cv2021
v.	) ORDER
CONSOLIDATED RAIL CORPORATION	) Resolving Docket) Nos. 61, 68, 69, 70,) 71, 72 and 73)

The above-captioned case is scheduled for trial beginning May 1, I996. Defendants have filed seven motions in limine: (1) to exclude testimony of Dr. Camille Wortman (Docket No. 61); (2) to exclude testimony or mention of system malfunction or applicability of alternate-warning regulations (Docket No. 68); (3) to exclude evidence or

comment that the subject warning system was inadequate (Docket No. 69); (4) to exclude documents which arc inadmissible under 23 U.S.C. § 409 (Docket No. 70); (5) to exclude evidence with respect to accidents at other crossings (Docket No. 71); (6) to exclude evidence of post-accident incidents at the subject crossing (Docket No. 73); and (?) to exclude presentation of opinion testimony by Glenn Slyker (DoCket No. 73). Plaintiff has filed a consolidated response to the last six motions and a separate response to the first. On April 26, 1996, the Court conducted a hearing on the motions. During the hearing the plaintlffraised a motion in limine of her own, to prohibit defendant from characterizing the decedent's conduct in driving around downed crossing gates as breaking the law.

DOCKET NO. 61 -- Testimony of Dr. Camille Wortman

In this motion, Conrail argues that plaintiff should not be pertained to offer the expert testimony of Dr. Camille Wortman because this expcrt's identity was first disclosed on April 4, 1996, in violation of this Court's order that disclosures with respect to expert testimony under Fed. R. Civ. P. 26(a)(2) were to be made by June 15, 1995.

Fed. R. Civ. P. 37(c)(1) provides, in pertinent part:

> A party that without substantial justification fails to disclose information required by Rule 26(a) [required disclosures] or Rule 26 (e)(1)
> [supplementation of required disclosures] shall not, unless such failure is harmless, be permitted to use as evidence at trial.., any witness or information not so

> disclosed. In addition to or in lieu ofthls sanction, the court, on motion and after affording an opportunity to be heard, may impose othe, appropriate sanctions ....

Plaintiff's counsel argues that it was not until after the deadline set by this Court that he decided that both Mrs. Jones and her children were displaying long-term inability to adjust to Mr. Jones' death. At that time he sought the evaluation of an expert, obtained a report as quickly as her could, and disclosed all necessary information to opposing counsel. Plaintiff's counsel admits that he simply forgot about the deadline and that, had he remembered, he would have sought from this Court relief from the deadline on the grounds that he had good cause and that defendant would suffer no harm from the unavoidable delay.

This Court is of the view that it needs to voit dire Dr. Woltman to ascertain if an earlier disclosure would have been possible, If it was not possible, then any harm which defendant might suffer from late disclosure could be cured by permitting the defendant to immediately depose Dr. Wontnan, prior to her testifying, if defendant feels that it will be surprised by any testimony that Dr. Wortman is likely to give.

Accordingly, a ruling on this motion shall be delayed until the Court and counsel have an opportunity to voir dire Dr. Wortman to ascertain how soon, following the death of a spouse and/or parent, it is typically possible to assess the long-term emotional and psychological effects on survivors. Thereafter, the Court shall decide whether Dr. Wortman will be permitted to testify and what, if any, actions need be taken to prevent prejudice to the defendant.

DOCKET NO. 68 - Suggestion of System Malfunction and/or Alternate Warnings

In this motion, defendant seeks an order prohibiting any statement by the plaintiff, by way of evidence, question, or cogent, that the signal system at hee Back Orville Road was "malfunctioning" and/or that Conrail had a duty to utilize the alternative warning measures described in thee Code of Federal Regulations.

In regulations made effective in January of 1995, the Federal Railroad Administration ("FRA") defined "warning system malfunction" as " an activation failure or a false activation of a highway-rail grade crossing warning system." 59 Fed Reg. 50105 (1994). This regulation, coming as it did after the subject accident, does not apply in this case. However, it is instructive as to the meaning of "malfunction."

This Court finds compelling the argument that when a train is stopped within view of the crossing, a motorist would conclude that the downed gates and flashing lights had been activated by that stopped train. Operating under that belief, the motorist would be enticed into going around the gates, that is, the motorist would perceive the activation as a "false" activation. The motorist would believe that it was safe to proceed since there can be no harm from a tra/n that is not moving.

Since the definition of"warning syste$_m$ malfunction" in the current regulations does not apply here, the Court must look to the plain meaning of the word "malfunction." This can be obtained from a dictionary. *Webster's New Third International Dictionary* defines "malfunction" as "to function

badly or imperfectly; fail to operate in the normal or usual manner." It is quite obvious that the reason warning devices are deemed necessary in the first place is to warn of the danger presented by a moving train approaching the crossing. It is apparent that there would bc no need to warn persons on the roadway that a train is sitting at a dead stop on the tracks, whether or not those persons were able to see the train for themselves. The purpose of the warning system is to prevent persons from crossing the tracks in front of moving trains. In other words, the "normal or usual" function is to warn of moving trains. If, on the other hand, the gates and lights are perceived as warning only of the presence of a stopped train, the warning system is "malfunctioning" because it is sending the wrong signal. As plaintiff argues: "[W]hen a warning system designed to stop motorists from proceeding actually causes them to do the Opposite, that system is, by definition, malfunctioning." (Memorandum in Opposition, at 2).

Plaintiff has also properly pointed out Rule 103(D) of FRA's General Code of Operating Rules recognized as far back as April 27, 1980, thc potential for extreme danger to motorists when gates and lights arc activated for extended periods of time yet no moving train crosses the roadway, (See Rule 103, quoted in Memorandum in Opposition, at 6).

Conrail's motion argues that the gates and lights were not malfunctioning because "[t]hey were working as designed, activated by rail equipment within the track circuit." (Motion, at 3). Conrail argues that plaintiff is suggest'rag disrepair or a neglected or broken-down system.

Defendant's motion also argues that plaintiff should not be allowed to suggest in any way that Conrail was

required by the circumstances to utilize the alternate warning methods set forth in the regulations. Plaintiff again admits that these regulations are not retroactively applied. However, the fact that regulations were ultimately promulgated traderscores the fact that those in thc industry rccognized that there were simple ways of avoiding the acciden! that occurred in this case. Again, this is a matter for the jury to decide: whether it was negligence for Conrail, in the face of known facts about this crossing (which facts plaintiff has the burden to prove), not to employ some simple alternate methods of warning motorists in the circumstance when the warning system has been activated by a stopped train.

The Court believes that the argument over the use of the word "malfunction" is more a battle of semantics than of substance. The plaintiff represents she will not state or imply that the gates and lights were broken down or otherwise in a state of disrepair. To the extent plaintiff's witnesses use the word "malfunction" to describe the situation at the railroad crossing, defense counsel is free to challenge that characterization on cross-examination. The motion to prohibit use of the word is denied.[1]

DOCKET NO. 69. Evidence or Comment that Warning System Was Inadequate

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[1] The Court has suggested that it give a preliminary instruction dealing with the competing positions of the parties with respect to the crossing. The Court will welcome such a proposed instruction to be given to the juror at the outset of the case.

Conrail seeks in this motion an order preventing the plaintiff from presenting any evidence or stating by question or comment to the jury that the signal system at the Back Orrville Road crossing was in any way inadequate. Conrail takes the position that the Secretary of the Department of Transportation has covered the subject of the adequacy of the warning system at crossings such as the one at issue in this case and that such regulations preempt application of any State common law of negligence.

The Federal Railroad Safety Act ("FRSA") provides that State authority over matters of railroad safety is preempted when the Secretary adopts a rule, regulation, order, or standard, covering the subject of such state authority, 49 U.S.C, § 20106 (formerly 45 U.S.C. § 434). The Code of Federal Regulations provides, in relevant part:

> (3)(i) "Adequate warning devices,"..., are to include automatic gates with flashing light signals when one or more of the following conditions exist:
>
> > (A) Multiple main line railroad tracks.
> > (B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.
> > (C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.
> > (D) A combination of high speeds and moderately high volumes of highway and railroad traffic.
> > (E) Either a high volume of vehicular traffic,

> high number of train movements, substantial numbers of schoolbuses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.
> (F) A diagnostic team recommends them.

23 C.F.R. § 646.214(b)(3)(i). Conrail argues that this regulation preempts State law with respect to the question of the adequacy of this crossing. Conrail argues that it had no duty to install motion sensing circuitry at this crossing. As authority for this proposition, Conrail cites CSX Transportation Inc. v. Easterwood, 507 U.S. 658 (1993). In fact, Easterwood does not support Conrail's position with respect to motion sensing circuitry.

The FRSA permits States to adopt more stringent safety requirements when they are "necessary to eliminate or reduce an essentially local safety hazard" so long as such requirements .are not "incompatible with a law, regulation, or order of the United States Government" and do not "unreasonably burden interstate commerce." 49 U.S.C. § 20106.[2]

Here it is a question of fact whether this crossing constituted a local safety hazard and whether the warning system was adequate. This Court believes that a reasonable jury could so conclude, in which event, the federal regulations would not preempt State law and the duties arising under the

---

[2] This statute was formerly 45 U.S.C. § 434, the statute discussed in Easterwood

common law of negligence, It is not out of line for the plaintiff to argue and attempt to prove that the warning system was inadequate and resulted in the death of her decedent. Whether the jury believes or accepts the argument is for the jury to decide.

Accordingly, defendant's motion is denied.

DOCKET No. 70 -- Admissibility of Documents under 23 U.S.C. §409

This motion seeks to exclude under 23 U.S.C. § 409, plaintiff's use of the following documents: (1) the report of the Public Utilities Commission of Ohio ("PUCO") on Railroad Information System Accident, Complaint and Inspection Data at Selected Crossings; (2) the PUCO accident investigation report on the subject accident, containing photographs; (3) the United States Department of Transportation ("US DOT") Crossing Inventory Report; and (4) US DOT Rail-Highway Grade Crossing Accident Incident Report for the subject accident.

Section 409 provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144 and 152 of this title or for the purpose of developing any highway safety construction improvement project

> which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location menOwned or addressed in such reports, surveys, schedules, lists, or data."[3]

The Court is of the view that defendant's position with respect to the admission of these documents is well-taken. Accordingly, defendant's motion is granted. However, plaintiff pointed out in its brief that defendant's exhibit list includes Exhibit U-I-5 which arguably falls within the pureJew of the statutory prohibition on use. Plaintiff's counsel shall be entitled to reserve the right to object to Conrail's introduction of evidence prohibited under Section 409.

DOCKET NO. 71 - Evidence Re: Accidents at Other Crossings

In this motion, Conrail seeks an order barring plaintiff's introduction of any evidence concerning accidents that occurred at crossings other than the Back On'ville Road crossing. Specifically, Conrail wants excluded any evidence related to the case of Wightman v. Consolidated Rall Comoration, 94 Ohio App. 3d 389 (1989), which involved 1989 fatalities at a grade crossing in Sandusky, Ohio. Conrail argues that the facts in Wightman are completely different

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[3] Section 409 was amended on November 28, 1995, to add "or collected" after "compiled." Pub.L.No. 104-59, Title III, § 323, 109 Stat. 591 (1995).

from the instant case and are irrelevant. Plaintiff argues, to the contrary, that Wightman is relevant on several fronts: (1) it represents another example of why Conrail's practice of not having a flairnan at multi-track crossings while gates are down for an extended period of time is so dangerous; (2) it provides proof that Conrail had ample time to take preventative measures against the Jones tragedy; and (3) it underscores why there is a qualitative difference between the arguable negligence of Scott Jones and the acts and omissions of Conrail.

Plaintiff also points out that Dr, William Berg, an expert witness in the itnstant case, was also an expert wittYess in the Wightman case. His familiarity with the facts of that case and his knowledge regarding Conrail's practices gained from that case, plaintiff *asserts,* ought to be admissible to the extent that knowledge bears on issues presented here.

The Court reserves judgment on the issue of the Wightman case. Counsel for the plaintiff is instructed not to discuss the Wightman case in the opening statement. In the event the Court concludes that Rule 403 of the Rules of Evidence require exclusion of testimony regarding the Wightman case, the motion will be granted. In the event the Court concludes that the application of Rule 403 should be delayed pending a clear indication of the nature of the Dr. Berg testimony with respect to the Wightman case, the Court will engage in a voit dire of the Dr. Berg testimony prior to a final ruling.

DOCKET NO. 72 - Evidence Re: Post-Accident Incidents at Subject Crossing

By way of this motion, Conrail seeks to preclude admission of evidence with respect to incidents that have occurred at the Back On'ville Road crossing since Mr. Jones was killed there, including testimony from Mrs, Jones that, four months alter her husband's' death, she was stopped for more than an hour with the gates down and a train stopped in the same position as the train had been stopped on the day of her husband's accident, As she sat in her car, Mrs. Jones observed more than 400 cars go around the gates.

Plaintiff argues that this evidence is relevant to show that Conrail has continued its practice of stopping trains there while the gates and lights are activated for an extended period of time without a flagman to warn motorists. Plaintiff asserts that this is evidence of Conrail's conscious disregard for public safety and it underscores, in plaintiff's view, the appropriateness of punitive damages. Mrs. Jones' testimony at the very least will serve to show traffic volume, since plaintiff is not permitted to submit the PUCO data showing traffic voltune.

Plaintiff's punitive damages argument is misplaced. The Court's memorandum opinion and order of November 3, 1995 (Docket No. 46) granted defendant's motion for summary judgment on the issue of punitive damages.

The Court will delay ruling on this motion until trial, where it will bc more clear whether the testimony of Mrs. Jones or any other witness as to post-accident incidents is needed to establish traffic volune on the road or some other relevant issue, DOCKET No. 73 Testimonny of Glenn Slyker

In its final motion, Conrail seeks to prevent plaintiff from using a retired engineer, Glenn Slyker, as a witness. Conrail asserts primarily that Mr. Slyker is not qualified to testify on several matters about wh/ch Conrail anticipates he will bc called upon to testify. Further, Conrail asserts that he was not disclosed as a potential expert until after the cut-offset by this Court.

Plaintiff argues that she plans to have Mr. Slyker Testify in three areas: (1) his observations, gleaned from over 1 O0 encounters with similar situations, regarding what drivers do in the circumstances that confronted Mr. Jones; (2) what practical preventative measures could have been taken by Conrail; and (3) what the engineer of the train that hit Mr. Jones could 'have done to slow or stop the train prior to reaching the crossing. Plaintiff asserts that Mr. Slyker's testimony on the first two matters would not be in the nature of "expert" tcstimony, but rather based on his own experience and informed opinion, As to the third issue, plaintiff argues that Conrail's objection that Mr. Slyker should not be allowed to testify because he retired in 1983 goes to the weight of the testimony not its admissibility.

The Court is satisfied Mr. S]ykcr is an appropriate lay witness. He may testify to his observations and experience. However, Mr, Slyker may not testify as an expert wireess, i.e,, he may not render his opinion as to what the engineer in the instant case could or should have done. The motion is granted to the extent that Mr. Slyker may not render his opinion and denied in all other respects.

Plaintiff's Motion to Exclude Characterization of Decedent's Conduct

Plaintiff made one motion in limine at oral arguments, requesting that defendant be prohibited from stating that the decedent broke the. law. by going around the downed crossing gates. Plaintiff argues it is fundamentally unfair and highly prejudicial for the defendant to characterize the decedent's actions in that manner. Defendant responds that the law clearly prohibits driving around gates so there should be no dispute that the act was illegal.

The defendant will be allowed to express its view that the act by the decadent was illegal. It will rema/n for the Court to instruct the jure on the legal impact, if any, of such activity.

Plaintiff's motion is accordingly denied.

Instructions To The Clerk's Office

The Clerk's Office is directed to fax a copy of this Order to counsel of record.

IT IS SO ORDERED.

/s/_____
David D. Dowd, Jr.
U.S. District Judge

APPENDIX II

RAIL-HIGHWAY CROSSING SAFETY

Fatal Crash and Demographic Descriptors,
Exhibit A-6B

Fatal Crashes by Traffic Control Device

Exhibit A-6b. Fatal Crashes by Traffic Control Device

TRAFFIC CONTROL DEVICE 1982-1992	RAIL CROSSING FATAL CRASHES
No Controls	114
Gates	697
Flashing Lights	1,192
Traffic Control Signal	240
Wigwags	24
Bells	47
Other Train-Activated Device	25
Active Device, Type Unknown	168
Crossbucks	1,480
Stop Sign	346
Other RR Crossing Sign	352
Special Warning Device - watchman, flagman	17
Other Passive Device	20
Passive Device, Type Unknown	51
RR Grade Crossing, type unknown	73
Unknown	28
TOTAL	4,874

Exhibit A-7. Fatal Crashes by Speed Limit

SPEED LIMIT	ALL FATAL CRASHES	FATAL INTERSECTION CRASHES	RAIL CROSSING FATAL CRASHES
20 mph or less	4,011	728	136
25 or 30 mph	95,743	26,759	2,521
35 or 40 mph	124,142	31,264	1,553
45 or 50 mph	107,504	21,924	525
55 mph	332,702	38,477	2,972
60 or 65 mph	11,610	26	4
Other/Unknown	57,356	11,478	1,365
TOTAL	733,068	130,656	9,526

Exhibit A-8. Fatal Crashes by Land Use

LAND USE	ALL FATAL CRASHES	FATAL INTERSECTION CRASHES	RAIL CROSSING FATAL CRASHES
URBAN	207,086	63,921	1,970
RURAL	268,398	12,652	3,390
UNKNOWN	1,507	4,704	35
MISSING	256,077	49,379	4,131
TOTAL	733,068	130,656	9,526

FILED
AUG 25 1998

No. 98-64

In The

Supreme Court of the United States

October Term, 1997

REBECCA A. JONES, EXECUTRIX OF THE ESTATE OF SCOTT R. JONES, DECEASED,

Petitioner,

v.

CONSOLIDATED RAIL CORPORATION,

Respondent.

On Petition For Writ Of Certiorari In The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

Plaintiff/petitioner is Rebecca A. Jones, Executrix of the Estate of Scott R. Jones, Deceased.

Defendant/respondent, Consolidated Rail Corporation, is a wholly-owned subsidiary of Conrail, Inc., which is not a publicly held corporation. Consolidated Rail Corporation has an ownership interest in the following companies: Albany Port Railroad Company; Belt Railroad Company of Chicago; Indiana Harbor Belt Railroad Company; Lakefront Dock and Railroad Terminal Company; Peoria & Pekin Union Railway Company; and TTX Corporation.

Consolidated Rail Corporation does not have an ownership interest in any other company, except for its wholly-owned subsidiaries.

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STATEMENT OF THE CASE

This petition seeks review of a decision of the Sixth Circuit affirming judgment that was entered on a jury verdict in favor of respondent Consolidated Rail Corporation ("Conrail").

The case arose out of a car-train accident that occurred at a crossing equipped with flashing lights and automatic gates. Most of the facts were undisputed: petitioner's decedent, Scott Jones, drove around the downed gates and into the path of Conrail's train, which was traveling within the allowable track speed, with its horn blowing and state-of-the-art alerting lights flashing on the front of the locomotive. Jones had an open view in the direction of the approaching train, but drove around at least one car that was stopped in his lane of travel at the crossing, and onto the tracks immediately in front of the train.

Petitioner sued Conrail in federal court on the basis of diversity of citizenship under 28 U.S.C. 1332. The complaint alleged negligence by Conrail in the design and operation of the grade crossing signal system (i.e., the automatic gates and flashing lights), negligent train operation, and negligent failure to provide adequate warnings. Petitioner also sought punitive damages under Ohio statute R.C. 2315.21, alleging that Conrail had acted with actual malice in causing the accident. The trial court granted respondent's motion for partial summary judgment on the punitive damage claim.

Petitioner proceeded to trial against Conrail on negligence claims only. At trial, the judge ruled that petitioner's decedent, Scott Jones, was negligent as a matter

of law for driving around downed gates. The jury found no negligence on the part of Conrail and judgment was entered on the jury verdict for Conrail. Pursuant to Fed. R. Civ. P. 59, petitioner moved for a new trial, arguing that the trial court should have entered judgment against Conrail based on a new liability theory that petitioner had developed only after the trial. The court denied petitioner's post-trial motion. Petitioner also moved for an order certifying five questions to the Ohio Supreme Court on appeal, and the court denied that motion.[1]

On petitioner's appeal to the Sixth Circuit Court of Appeals, the jury's verdict and the rulings on petitioner's post-trial motions were affirmed. Petitioner's petition for rehearing *en banc* was denied.

For the reasons discussed below, there is no cause for this Court's review of the Sixth Circuit decision. Misstatements of fact and law in the petition underscore the obvious lack of meritorious questions for review.

REASONS FOR DENYING THE WRIT

A. The facts will not support a jury verdict for petitioner.

Petitioner urges the Court to review the Sixth Circuit decision in the hope of gaining another trial. Setting aside for the moment the procedural problems with petitioner's reliance on a strict liability theory that was developed

[1] Petitioner proposed the questions pursuant to Rule XVIII, Ohio Supreme Court Rules of Practice.

only after judgment, the argument fails because the facts of this case would not support a finding of liability even under the new liability theory proposed by petitioner.

Scott Jones drove up to a railroad grade crossing where the roadway was closed to traffic by automatic gates and flashing lights. The car that was stopped immediately behind the gates was occupied by a woman and her five-year-old son. One or more drivers behind that vehicle began sounding their horns to urge that driver to go around the gates. Nagucki TR 325, App. H, p. A28. (It is uncertain whether Jones was among those drivers honking at the stopped car.) At trial, the woman testified that her son told her, "No, Mommy, don't go," and she remained stopped at the gates. Nagucki TR 305, App. H, p. A28.

With the lead car stopped at the gates, Scott Jones pulled out into the lane of oncoming traffic, crossing over the no-passing, solid double yellow lines on the pavement, went around the gates, past the flashing lights, and onto the tracks directly into the path of Conrail's train. The engineer was blowing the horn and the alerting lights on the front of the train were flashing. As noted by the trial court in its ruling on petitioner's post-trial motion, the evidence established that the engineer had been sounding the horn for forty seconds. Gardner TR 661, App. I, p. A30. (The horn operation was recorded on a locomotive black box.) Jones either failed to look and listen for the train or entered the crossing expecting to cross ahead of the train. The evidence established that Jones had an unobstructed view of the train for at least 17 seconds before the accident. Berg TR 453, App. J, p. A32.

A second train that was stopped in the vicinity of the crossing was on the far set of tracks 500 feet to the north of the crossing (to the right of Mr. Jones's westbound car.) Landis TR 186, App. F, p. A22. The train that struck Jones approached from his left on the near set of tracks; the stopped train, therefore, did not affect or obstruct Jones's view of the approaching train. If Jones had looked to his left, he could have seen the train; if he had listened, he could have heard the horn.

The jury found that Conrail was not negligent in the maintenance of its crossing or the operation of its train. The signal system was operating properly, as designed, and Conrail's engineer was operating the train lawfully and in accordance with Conrail's rules.

Petitioner urges the Court to effectively legislate a new requirement that railroads take "alternate measures to provide for the safety of motorists" when a signal system is operating at a 2-track crossing because of standing equipment on one track. (p. 10.) Even if the court were to announce such a rule, a retrial of this case under that ruling would not change the outcome here. Petitioner asserts that Conrail had a train stopped near the crossing for "at least 10 minutes," and that Conrail's crew on the stopped train "took no measures to provide for the safety of highway traffic" (p. 2.) Both statements are simply untrue.

Conrail's INPI-7 train came to a stop on the far set of tracks, about 500 feet from the crossing, in order to remove some helper units (additional locomotive power) that had been added to the rear of the train to assist it in climbing "Wooster Hill." Landis TR 174, App. F, p. A21.

After INPI-7 had crossed Wooster Hill, the helper units were no longer needed, and Conrail was cutting off the units for other use. The crew testified that the uncoupling of the helper units usually takes about 5 minutes, and that the process had not yet been completed when the second train, ENS-401, came into view. Russell TR 151, 715, App. G, p. A25. The evidence was, therefore, that the train was stopped for only a few minutes. During that time, the conductor on INPI-7 was preparing to flag the crossing, and was putting on his winter weather gear (coat and boots) when he saw the approaching train. Russell TR 151, App. G, p. A24.

In short, Conrail's crew was attempting to provide supplemental warnings to motorists at the crossing. The jury's finding that Conrail was not negligent was correct and supported by the evidence even under the duty argued by petitioner here. The Court should not grant the Certiorari petition because the ruling sought by petitioner would not affect the outcome in this case.

B. Petitioner failed to raise this argument before trial.

The argument raised in this petition is that the Court should announce a rule of negligence *per se* and strict liability in the interest of public safety to require that railroads provide alternative warnings when signal systems are activated by trains stopped within the track circuitry at multi-track crossings. Petitioner, however, never made that argument until after judgment was entered at the jury trial. In his post-judgment motion for new trial, petitioner's counsel wrote that this liability

theory "struck him like a lightning bolt several days after the jury's verdict . . . " (Motion, App. D, p. A17.)

The Sixth Circuit noted that appellate courts will "reach newly-advanced arguments only where the proper resolution is beyond any doubt or where 'injustice might otherwise result.' " *Jones v. Consolidated Rail Corporation*, No. 96-3828. App. 5a, *quoting Singleton v. Wulff*, 428 U.S. 106, 121 (1976). The trial court did not restrict petitioner in presenting the legal theories underlying her case, and she had an obligation to identify all of her theories of recovery when the case was tried.

Petitioner does not answer the Sixth Circuit's decision to "decline to address" the arguments that she makes here. Pet. App. 6a. This Court should decline to grant certiorari on a question that was not properly presented to the Sixth Circuit and was not decided by the Sixth Circuit.

C. The legal theory of petitioner's argument is wrong.

Petitioner urges the Court to announce a rule that signal systems at multi-track railroad crossings are "disabled" when those systems are activated by railroad equipment standing within the track circuit. Petitioner proposes that such a rule would improve safety by requiring railroads to provide alternative warnings. (Petitioner had also presented a related argument on appeal below, not raised here, that the proposed new rule would excuse drivers who go around gates under those conditions. The trial court's finding that Mr. Jones was negligent as a matter of law for driving around downed gates, therefore, is no longer in dispute.) Petitioner cites to two

sources as support for her argument: (1) the Federal Railroad Administration's (FRA) regulatory definition of an "active warning device," and (2) this Court's decision in *Baltimore & P.R. v. Catharine Landrigan*, 191 U.S. 461, 24 S. Ct. 137, 48 L.Ed. 262 (1903).

At 23 C.F.R. 646.204(j), the FRA defined an "active" warning device as one "activated by the approach or presence of a train, such as flashing lights, automatic gates and similar devices . . . all of which display to motorists a positive warning of the approach or presence of a train." Pet. App. 174a. Petitioner argues that when a warning system has been activated by railroad equipment standing within the track circuit, it is no longer an "active" warning device because it does not signal a "positive warning of the approach of a train."

The flaw in that argument is that it focuses on only part of the definitional language in the regulation and ignores the rest. A warning system that gives positive warning of the "presence" of a train is an "active" warning system under the regulation, whether or not it provides a positive warning of the approach of a train. The signal system at the Back Orrville Road was an "active" system on the evening of the accident.

Moreover, the FRA addressed the situation of signal systems activated by standing trains and *rejected* the requirement proposed by petitioner here that railroads provide alternative warnings when trains activate those systems in the course of normal operations. At 49 C.F.R. 234.209, the FRA required railroads to "provide for safety of highway traffic" when the "normal functioning of any

system" is "interfered with," and defined such interference to include "trains, locomotives or other railroad equipment standing within the system's approach circuit, *other than normal train movements* or switching operations, where the warning system is not designed to accommodate those activities." (Emphasis added.) The FRA issued a rule-interpretation notice on March 24, 1995, stating that "it shall not be considered interference if a train is standing on an approach circuit waiting for a signal indication or authority for movement." (Rule Interp., App. E, p. A19.) In other words, FRA expressly rejected any requirement that railroads provide alternative warnings when signal systems are activated by trains engaged in normal train movements, such as those in which INPI-7 was engaged.

Congress gave the FRA exclusive authority over matters of railroad safety by declaring that regulations promulgated by the FRA preempt state authority over those subjects.[2] Petitioner's proposal that the Court override the authority of the FRA and impose, through common-law duties, new requirements on railroads that the FRA has expressly rejected is misguided and indicates a mistaken view on the role of the Court.

The Court's 1903 decision in *Baltimore & P.R. v. Landrigan*, 191 U.S. 461, likewise, does not support petitioner's argument. That case involved a manual railroad gate that was left down at night over the roadway without an

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[2] 49 U.S.C. 20106 states: " . . . A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement." (App. K, p. A34.)

attendant. The gate required an attendant for operation. Since the gate operation was not automatic, *i.e.*, "activated by the approach or presence of a train," as specified under 23 C.F.R. 646.204(j), it was not an "active warning" system as defined by FRA. In effect, the railroad gate in *Landrigan* was no different from a flagman. The Court's decision in *Landrigan* cannot be applied to affect the scope of a railroad's duty at today's active-warning crossings.

The Sixth Circuit's decision below is consistent with rulings from that court in two prior cases. In *Ayoub v. National Railroad Passenger Corp.*, 76 F.3d 794 (6th Cir. 1996), the plaintiff's decedent, like Scott Jones, drove around traffic that was stopped at an automatic-gate crossing and was struck by a train. Plaintiff alleged that the railroad breached its duty to provide credible warnings because the gate system had a history of malfunctions. The trial court dismissed the case on summary judgment and the Sixth Circuit affirmed, holding that "evidence of prior malfunctions of warning signals at a railroad crossing is irrelevant so long as the signals functioned properly at the time of the accident." *Id.* at 796.

Likewise, in *Cox v. CSX Transp. Inc.*, no. 88-6235, 88 F.2d 1086 (Table), 1989 WL 119375 (6th Cir. 1989), the plaintiff was struck by a train when he drove onto a crossing where flashing light signals were operating. Plaintiff claimed that the signals were unreliable because of prior malfunctions. The trial court excluded evidence of the alleged prior malfunctions and the case went to a jury which returned a verdict for the railroad. The Sixth Circuit affirmed the judgment, holding that evidence of the prior malfunctions was irrelevant. Moreover, the Court ruled that even if the trial court erred in excluding

the evidence, that error would be harmless, given the driver's absolute duty to obey the warnings and use caution, whether or not he believed the warnings to be credible. Noting that the plaintiff could have seen the train when the train was 600 feet or more away, the court held that evidence of the alleged prior malfunctions would not excuse the driver's conduct:

> "Under the circumstances, we hold that the proffered evidence would not have been probative of a justification for Cox's actions."

Unable to locate supporting authority for her argument, petitioner can cite only to decisional law that is consistent with the Sixth Circuit's ruling below, arguing that those decisions were wrongly decided. Petitioner cites *McDowell v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 507 F.2d 5 (8th Cir. 1974), *Frankenthal v. Grand Trunk W. R.R. Co.*, 120 Ill. App. 3d 409, 458 N.E.2d 530 (Ill. App. Ct. 1983), *Hamilton v. Allen*, 852 P.2d 697 (Okla. 1993), all cases where courts refused to impose any duty on railroads to provide alternative warnings at gated crossings under the circumstances at issue here.

CONCLUSION

Petitioner proposes that the Court, "in a stroke" (p. 11), change the law regarding the duty of railroads at active-warning crossings and that such change be made retroactive so that she may retry her case without the burden of proving fault. For the reasons stated herein, the Court should deny this petition.

Respectfully submitted,

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APPENDIX A

James T. COX, Plaintiff-Appellant,

v.

CSX TRANSPORTATION, INC, Defendant-Appellee.

No. 88-6235.
United States Court of Appeals, Sixth Circuit.
Oct. 12, 1989.

M.D. Tenn.
AFFIRMED.
On Appeal from the United States District Court for the Middle District of Tennessee.
Before BOYCE F. MARTIN, Jr. and MILBURN, Circuit Judges, and CONTIE, Senior Circuit Judge.
PER CURIAM.

In this diversity tort action, plaintiff-appellant James T. Cox appeals a jury verdict for defendant-appellee *CSX Transportation, Inc.* ("*CSX*"). For the reasons that follow, we affirm.

I.

A.

On May 6, 1980, at approximately 11:40 a.m., James T. Cox was severely injured when the fully loaded dump truck he was driving was struck by an L & N Railroad train at the "Amos" crossing, a private railroad crossing in Williamson County, Tennessee. Cox originally brought an action on May 15, 1981, against the L & N Railroad, Monsanto Company, and the train engineer in the Circuit Court of Williamson County, Tennessee. The original action was voluntarily dismissed on November 11, 1986.

Cox, by and through his guardian, First Tennessee Bank, filed this action on May 14, 1987, against Monsanto Company and CSX (a successor in interest to L & N Railroad). Upon motion of Cox's counsel, an order dated August 17, 1988, was entered dismissing Monsanto Company with prejudice.

Immediately prior to trial, the district court heard motions in limine on evidentiary issues. Plaintiff Cox moved for permission to introduce evidence that he, as a matter of habit, always stopped prior to negotiating the crossing. Defendant moved to exclude all evidence that on previous occasions the signals at the railroad crossing "malfunctioned" in that the signals had activated with no train approaching or had failed to activate when a train approached. Defendant also sought to exclude evidence of "near-misses" between automobiles and trains at the same crossing.

Before ruling on defendant's motion, the district court inquired as to whether it was Cox's position that on the occasion of the accident he stopped at the crossing and whether Cox would present proof that the warning signal was malfunctioning at the time of the accident. Counsel for Cox stated that he would introduce evidence that Cox had a habit of always stopping at the crossing to prove that he stopped on the occasion of the accident, but he conceded that the evidence would show that "the signals were probably functioning." The district court ruled that Cox's counsel could introduce habit evidence to attempt to prove that Cox stopped on the occasion of the accident but that he could not refer to prior malfunctions or "near-misses" in his opening statement. The court's position was that unless Cox intended to prove

that the signal lights were not working on a particular occasion, past negligence would have no "connection" with the accident. Moreover, malfunctions would be irrelevant in light of Cox's position that he stopped.

During his case-in-chief when plaintiff attempted to present the testimony of numerous truck drivers that the warning signals often malfunctioned, the district court would not allow that testimony. At the conclusion of Cox's evidence, CSX moved for a directed verdict on all issues and all theories of liability. The district court granted a directed verdict on the following theories of liability: (1) that defendant was guilty of negligent design and maintenance of the railroad crossing; (2) that defendant was negligent by ignoring warnings of a dangerous condition; and (3) that defendant was guilty of gross negligence and willful misconduct.

After CSX presented evidence that Cox did not stop before entering the crossing, Cox's counsel again tried to offer in rebuttal evidence of prior signal malfunctions and "near-misses."[1] The district court again refused to allow the testimony.

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[1] Cox's proffer included the deposition of Leslie Morell, a local resident, to the effect that she had seen the signals malfunction many times, that she had informed CSX personnel of the malfunctions, and that she had had some "near-misses" when the signal had failed to flash as a train approached the intersection; testimony of several truck drivers that the signals often malfunctioned; testimony of Charles Armstrong, the signal maintenance man, to the effect that he had found the signals malfunctioning during his routine maintenance; and the testimony of Dr. Joseph Able concerning the psychological effects of the signal malfunctions upon motorists. Since Cox has failed to argue the admissibility of the testimony of Dr. Able on

The jury returned a verdict for the defendant. Cox filed a timely motion for a new trial which was overruled. This timely appeal followed.

B.

At the Amos crossing, the L & N Railroad runs generally from north to south, and the haul road on which Cox was traveling runs from east to west. When the collision occurred, the ninety-three-car train was traveling toward the south, and the plaintiff's loaded truck was traveling toward the west across the track.

Prior to the accident, Cox negotiated the crossing several times a day in connection with his job of hauling phosphate from a local mine to a tipple located adjacent to the L & N Railroad track. The train involved in this accident was an "extra," running at a time when trains were not normally expected at the crossing. The parties agree that the weather conditions were dry and clear on the day of the accident. It is uncontested that the train gave a warning whistle and that its rotating headlight was operating as the train approached the crossing.

It is uncontradicted that from the vantage point of a truck driver, such as Cox, a train could be seen at least six hundred feet away. In fact, Cox's counsel conceded on the record that "Jimmy Cox could have seen down the track from better than 600 feet if he were one to two truck lengths back; that may save a lot of time." Tr. 195.

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appeal, we will not discuss it further.

Since Cox was so severely injured that the trial court found him incompetent to testify, the only eyewitnesses able to testify were members of the train crew. The train conductor, Mr. Rauschenberger, testified that the truck approached the crossing, slowed, and when the train was only 150 feet away, Cox's truck proceeded onto the tracks. The conductor engaged the emergency brake, but the momentum of the train carried it into the truck. The conductor testified that he could see Cox and that "[Cox] was looking strait ahead" in his truck.

Cox's position, through counsel, was that he stopped at the crossing as was his habit, that he looked but the train was not visible, and that the train approached at such a high rate of speed that it caught him in the crossing. Several of Cox's codrivers testified that Cox was a very careful driver and that he always stopped at the crossing. Testimony conflicted about the exact speed of the train with the train crew estimated the speed at approximately thirty miles an hour, an expert witness for CSX estimating the speed at thirty-two miles per hour, and Cox's coworkers estimating the speed at forty-five miles per hour.

Plaintiff Cox presents several issues for appeal, all of which turn upon the propriety of the district court's ruling on the admissibility of evidence of prior malfunctions of the warning signals and "near-misses" at the railroad crossing. Plaintiff argues that the evidence was relevant and admissible on the following issues: (1) negligence in the maintenance of the crossing and its signal system, (2) knowledge of the dangerous nature of the crossing created by the malfunctioning signal system, (3) gross negligence and willful and wanton conduct bearing

upon the issues of punitive damages and Cox's contributory negligence, and (4) Cox's contributory negligence.

II.

A.

A trial judge's decision regarding an evidentiary ruling will not be reversed absent a clear showing of abuse of discretion. *See, e.g., Schrand v. Federal Pac. Elec. Co.*, 851 F.2d 152, 157 (6th Cir.1988); *United States v. Rios*, 842 F.2d 868, 872 (6th Cir.1988) (per curiam), *cert. denied*, 109 S.Ct. 840 (1989) (*citing United States v. Mahar*, 801 F.2d 1477, 1495 (6th Cir.1986)). Abuse of discretion exists where the reviewing court is firmly convinced that a mistake has been made. Schrand, 851 F.2d at 157 (*citing Hill v. Bach, Halsey, Stewart, Shields, Inc.*, 790 F.2d 817, 826 (10th Cir.1986)).

A reviewing court will not grant a new trial or set aside a judgment unless the error complained of affects the substantial rights of the parties and some action is necessary to achieve substantial justice. Fed.R.Civ.P. 61; 28 U.S.C. Sec. 2111; *McDonough Power Equip., Inc., v. Greenwood*, 464 U.S. 548, 104 S.Ct. 845 (1984). The reviewer must assess the likelihood that the error affected the outcome of the case. *Schrand*, 851 F.2d at 157.

B.

The district court excluded the proffered evidence because it was "not connected" to this accident and not

relevant. Relevant evidence is evidence having any "tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Fed.R.Evid. 401. The relevance of evidence depends upon the purpose for which it is offered. *See Koloda v. General Motors Parts Div.*, 716 F.2d 373, 375 (6th Cir.1983). Cox's arguments assert four purposes for the proffered evidence.

First, Cox argues that the evidence is probative of negligent maintenance of the crossing. In Tennessee, a plaintiff can recover on a negligence theory "only if the defendant's conduct can be shown to be (1) negligence, and (2) [a] proximate cause of the injury." *Tennessee Trailways, Inc. v. Ervin*, 222 Tenn. 523, 438 S.W.2d 733, 735 (1969). In proximate cause analysis, the first inquiry is whether the acts of the defendant were a cause in fact of the injury. "If that inquiry shows that defendant's conduct . . . was not a factor in causing plaintiff's damage, that ends the matter." *Id.*

At the trial, it was uncontradicted that the warning signal was functioning as Cox approached the railroad crossing. Moreover, Cox's position throughout the trial was that he stopped out of habit before entering the crossing regardless of whether the signals were on or off. The only logical conclusion is that negligent maintenance was not a factor in causing Cox's injury. We agree with the trial court that past malfunctions and "near-misses," if offered to prove negligent maintenance, were "not connected" and irrelevant.

Cox's second argument for admissibility of the evidence is that past malfunctions and "near-misses" gave notice to CSX of a "dangerous condition." This argument presupposes that prior malfunctions made the crossing dangerous on the day of the accident. The train engineer testified that if he were aware of a problem with the signals, he would change the way he operated his train. However, the uncontradicted proof at trial was that the signals were working on the day of the accident. In the absence of proof that a dangerous condition existed at the time of the accident, we must conclude that notice that a dangerous condition had existed would be irrelevant.

Moreover, before this court will allow proof of similar incidents to show notice of a dangerous condition, the circumstances involved must be sufficiently similar to give notice of the danger. *Koloda*, 716 F.2d at 376. The proffered testimony of Mrs. Morrell was about "near-misses" which occurred when a train was on the tracks but the warning signals failed to activate. Truck drivers would have testified that the signals often malfunctioned, sometimes giving false warnings and sometimes failing to give a warning when needed. The proffered testimony of Mr. Armstrong, the man who maintained the signals for CSX, was to the effect that he found the signals flashing in the absence of a train on one or two occasions in the course of routine maintenance. While the proffered testimony might prove that defendant CSX knew the signals had malfunctioned, it does not prove that CSX had notice of the alleged danger; viz., that drivers were ignoring an active warning signal at the railroad crossing.

Cox next argues that the proffered evidence should have been admitted to prove that the defendant was

guilty of gross negligence and willful misconduct. In light of our conclusions that past negligent maintenance was irrelevant to this action and the past incidents were not probative of notice to defendant CSX that drivers were ignoring active warning signals, we find that this argument is without merit.

Finally, Cox argues that the evidence was admissible on the issue of his own contributory negligence. Simply stated, Cox's argument is that past malfunctions caused him to ignore or pay less attention to the signal on the day of the accident. We note that this argument flies directly in the face of Cox's position, and proof, that he always stopped as he approached the crossing and would require a jury to speculate that he suddenly decided the signals were too unreliable to follow.

Cox argues that prior malfunctions justifiably "blunted the edge of caution," relying on the "absent flagman" cases. *See, e.g., Gaines v. Tennessee Central Ry. Co.*, 175 Tenn. 389, 135 S.W.2d 441 (1940); *Southern Ry. Co. v. Penley*, 175 Tenn. 380, 134 S.W.2d 177 (1939). The "absent flagman" cases hold that "where the railroad company maintains a watchman, that fact being known to the traveler, and the watchman is away from his post of duty and fails to signal the approach of trains" and an accident results, the jury should be allowed to decide whether the traveler was justified to rely on the absence of a flagman. *Penley*, 175 Tenn. at ___, 134 S.W.2d at 180.

We do not find those cases persuasive. In the "absent flagman" cases, travelers were mistakenly relying on past reliability. Cox argues that he was refusing to rely on the

signals at the railroad crossing because of past unreliability.

In *Nashville, Cinn. & St. Louis Ry. v. Barnes*, 177 Tenn. 690, 152 S.W.2d 1023 (1941), the Tennessee Supreme Court held that a motorist was guilty of contributory negligence as a matter of law because he failed to roll his windows down or take extra precautions to hear a train approaching a railroad crossing in view of increased danger from very limited visibility. "[W]hen a crossing is 'particularly dangerous' because of conditions obvious to the driver, he should stop in order effectively to look and listen before proceeding on the tracks, this in the exercise of ordinary care." *Id.* at ___, 152 S.W.2d at 1025. Under the facts of this case, the danger was obvious to Cox. As he traversed this same railroad crossing several times a day, his duty of care for his own safety was increased rather than decreased.

Moreover, motorists must not enter a railroad crossing unless it is safe to do so. "In Tennessee, a railroad crossing is a warning of danger and a motorist is required to exercise ordinary care for his own safety." *Newport v. Cincinnati, New Orleans & Texas Pac. Ry.*, 509 F.2d 1246, 1248 (6th Cir.1975) (applying Tennessee law). A motorist entering a railroad crossing must look and listen and is "chargeable with seeing what [is] there for him to see." *Jeffries v. Louisville & Nashville RR*, 560 S.W.2d 920, 921 (Tenn.Ct.App.1977), *cert. denied* (1978).

There for him to see and to hear was a train approaching with lights flashing, whistle blowing and bell ringing. Perhaps the visibility was to some degree

limited by tree growth, but plaintiff knew of that condition as he crossed that same track . . . each working day. The evidence is undisputed that the rain could have been seen by plaintiff for some distance before mounting the tracks. *Id.* at 922 (affirming a directed verdict on those facts).

In this case, the evidence is undisputed that Cox knew of the crossing and could have seen the train when it was 600 feet or more away. Crossing warning lights were operating. The train sounded a warning whistle, and its Mars light was operating. It was daylight on a clear, dry day, and according to undisputed eyewitness testimony, Cox pulled in front of the train when it was only 150 feet away without looking toward the train. Under the circumstances, we hold that the proffered evidence would not have been probative of a justification for Cox's actions. Accordingly, we conclude that the district court did not abuse its discretion by refusing to admit the proffered evidence on the issue of Cox's contributory negligence.

Assuming arguendo that the district court committed error, we would find the error harmless. The uncontradicted evidence is that Cox could have seen the train when it was 600 feet or more away and that he could have stopped his truck before he reached the rails. Under Tennessee law he is guilty of contributory negligence as a matter of law. *See Newport*, 509 F.2d at 1249 (applying Tennessee law to reverse a trial court by finding contributory negligence as a matter of law on very similar facts); *Perry v. Gulf, Mobile & Ohio RR*, 502 F.2d 1144, 1146 (6th Cir.1974) (applying Tennessee law and finding contributory negligence as a matter of law where driver was

aware of the crossing and at 25 feet from crossing driver could see 500 feet up the tracks); *Jeffreys* [sic], 560 S.W.2d at 922.

Cox claims additional errors as follows: (1) the trial court erred in granting a directed verdict on the issue of negligent maintenance; (2) the trail court erred in granting a directed verdict on the issue of gross negligence; and (3) the trial court erred in not granting a new trial. All of these arguments are premised upon the claim that the district court erred in excluding the proffered evidence concerning prior malfunctions and related matters. Since we find no error in the evidentiary rulings, we find no merit in these assignments of error.

III.

Accordingly, for the reasons stated, we AFFIRM.

APPENDIX B

TITLE 23 – HIGHWAYS

CHAPTER I – FEDERAL HIGHWAY ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

PART 646 – RAILROADS – Table of Contents

Subpart B – Railroad-Highway Projects

Sec. 646.204 Definitions.

For the purposes of this subpart, the following definitions apply:

Active warning devices means those traffic control devices activated by the approach or presence of a train, such as flashing light signals, automatic gates and similar devices, as well as manually operated devices and crossing watchmen, all of which display to motorists positive warning of the approach or presence of a train.

Company shall mean any railroad or utility company including any wholly owned or controlled subsidiary thereof.

Construction shall mean the actual physical construction to improve or eliminate a railroad-highway grade crossing or accomplish other railroad involved work.

A diagnostic team means a group of knowledgeable representatives of the parties of interest in a railroad-highway crossing or a group of crossings.

Main line railroad track means a track of a principal line of a railroad, including extensions through yards,

upon which trains are operated by timetable or train order or both, or the use of which is governed by block signals or by centralized traffic control.

Passive warning devices means those types of traffic control devices, including signs, markings and other devices, located at or in advance of grade crossings to indicate the presence of a crossing but which do not change aspect upon the approach or presence of a train.

Preliminary engineering shall mean the work necessary to produce construction plans, specifications, and estimates to the degree of completeness required for undertaking construction thereunder, including locating, surveying, designing, and related work.

Railroad shall mean all rail carriers, publicly-owned, private, and common carriers, including line haul freight and passenger railroads, switching and terminal railroads and passenger carrying railroads such as rapid transit, commuter and street railroads.

Utility shall mean the lines and facilities for producing, transmitting or distributing communications, power, electricity, light, heat, gas, oil, water, steam, sewer and similar commodities.

[40 FR 16059, Apr. 9, 1975, as amended at 62 FR 45328, Aug. 27, 1997]

APPENDIX C

TITLE 49 - TRANSPORTATION

CHAPTER II - FEDERAL RAILROAD ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

PART 234 - GRADE CROSSING SIGNAL SYSTEM SAFETY - Table of Contents

Subpart D - Maintenance, Inspection, and Testing

Sec. 234.**209** Interference with normal functioning of system.

(a) The normal functioning of any system shall not be interfered with in testing or otherwise without first taking measures to provide for safety of highway traffic that depends on normal functioning of such system.

(b) Interference includes, but is not limited to:

(1) Trains, locomotives or other railroad equipment standing within the system's approach circuit, other than normal train movements or switching operations, where the warning system is not designed to accommodate those activities.

(2) Not providing alternative methods of maintaining safety for the highway user while testing or performing work on the warning systems or on track and other railroad systems or structures which may affect the integrity of the warning system.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

REBECCA A. JONES, Executrix of the Estate of Scott R. Jones, Deceased Plaintiff, -vs- CONSOLIDATED RAIL CORPORATION Defendant.	CASE NO. 5:94CV2021 Judge Dowd **MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL**

Introduction

This case presented the jury with sharply conflicting theories. Jones argued that the warning system at the Back Orrville crossing was "malfunctioning" and that Conrail negligently failed to take readily available preventative measures to warn Scott Jones that a train was approaching. Conrail contended that Jones was given adequate warning of an approaching train; that Jones broke the law by driving around functioning gates; and that his action was the sole proximate cause of his death. What both parties unwittingly overlooked, however, is the fact that the gates and lights at this crossing were neither functioning nor malfunctioning **as active warning devices** when this collision occurred. They simply weren't functioning at all because, approximately 15 minutes before Scott Jones arrived, they had been **deactivated as an active warning system by INPI.**

Consequently, the warning system was inadequate, as a matter of law, to warn Jones that a train was approaching.

Rule 59(9)(A) provides for a new trial when an error of law occurs at trial and is brought to the attention of the trial court through a timely post-trial motion. This case was tried to the jury **as if there were a factual dispute about whether the gates and lights were functioning as an active warning system when they clearly were not.** As this discussion will show, Conrail violated a safety statute and, therefore, was negligent as a matter of law. Had plaintiff's counsel pointed this out to the Court when he moved for a directed verdict on the issue of Conrail's negligence, the Court would have been obliged to direct a verdict in plaintiff's favor on that issue. Because this was not done, the Court overruled plaintiff's motion for a directed verdict. As a result, the jury returned a verdict which cannot be reconciled with the fact that Conrail breached its duty to maintain the gates and lights as an active warning system while ENS401 was approaching. Consequently, Jones is entitled to a new trial.

This case reveals once again the truth of Edward R. Murrow's favorite aphorism: "the obscure we see, the obvious takes longer." Although this writer feels a sense of chagrin at having missed the obvious until the truth struck him like a lightning bolt several days after the jury's verdict, he has plenty of distinguished company in failing to recognize the fact that, when gates and lights have been activated for an extended period of time, **they cease to function as an active warning device.** The tragedy is that, although thousands of deaths and crippling injuries have occurred in circumstances where gates and

lights have been activated for an extended period of time, this fundamental truth has been missed by legislatures, regulatory agencies, courts and lawyers alike. The *Wightman* case is apparently one of a small handful of cases which have been successfully prosecuted on behalf of a person killed or injured after proceeding around gates. It seems apparent, therefore, that Scott Jones' death should be viewed as the tip of an iceberg which represents nothing less than a public safety issue of profound proportions. This being the case, this writer feels morally compelled to do more than simply ask this Court to grant plaintiff a new trial. The overriding aim of this memorandum, therefore, will be to convince this Court that the best way to reduce unnecessary deaths and catastrophic injuries at grade crossings is for this Court to assist in getting the issues raised herein before the United States Supreme Court in the most expeditious manner possible.

After carefully analyzing the factual and legal basis for Plaintiff's Motion for a New Trial, this memorandum will attempt to show that automatic warning devices at public grade crossings should be treated as safety appliances, in the same way handholds and brakes are considered legislatively mandated safety devices for the protection of employees under the Federal Employers' Liability Act. When an employee is injured because of a defect in a safety appliance, a railroad company is held strictly liable. Permitting safety equipment at a grade crossing to remain deactivated while a train is

* * *

APPENDIX E

FRA Rule Interpretation

Interference is any condition that circumvents, hinders, impedes, or diminishes whatsoever the intended warning of a system, and may be accomplished by testing, installing, repairing, replacing, operating, or manipulating a warning system component used in detecting the presence of or displaying warning of a train, or in indicating the operation of the warning system. There is no difference between the accidental or intentional interference with respect to the enforcement of this rule.

Tests of crossing warning system must not be conducted until it has been ascertained no train movements will be affected and provisions have been made for the safety of highway traffic.

Interference includes but is not limited to:

(1) Trains, locomotives, or other railroad equipment left standing within the system's approach circuit, other than normal switching operations, where the warning system is not designed to accommodate those activities.

(2) Not providing alternative methods of maintaining safety for the highway user while testing or performing work on the warning systems or on track and other railroad systems or structures which may affect the integrity of the warning system.

(3) Tieing up gate arms by railroad personnel.

It shall not be considered interference if a train is standing on an approach circuit waiting for a signal indication or authority for movement. It shall not be considered interference, when in the course of normal testing, a

shunt placed on the rail causes adjacent crossing warning systems to be activated.

Using manual over-rides to activate or deactivate a crossing warning system is not considered interference, as long as proper warning is provided to highway users.

Activation of a warning system during a normal movement through a crossing by on-track vehicles is not considered interference with the warning system. Intermittant activations during a normal movement through a crossing by on-track vehicles is not considered interference with the warning system, provided that the railroad's operating rules or other instructions provide for warning of highway traffic at the crossing. In general, measures taken for the safety of trains and highway users should be consistent with those specified in Sections 234.105 and 234.107 of this part.

March 24, 1995

APPENDIX F

[Excerpts From The Testimony Of John Landis]

* * *

[p. 174] Q. And you got your consist and you left according to the records about 3:50 p.m.?

A. Right.

Q. You would have pulled out of Crestline?

A. Left Crestline.

Q. I'm sorry, sir?

A. Left Crestline.

Q. Left Crestline. And we already know from Mr. Russell that sometime along the route or about the time you left Crestline, doesn't matter exactly, you became aware you would need some help getting over the Wooster hill?

A. We knew before we left Crestline.

Q. Okay. So Mr. Russell has a little different recollection. Doesn't matter. It's your recollection.

You knew you were going to get a helper before you left?

A. We had – I was short a unit because it was down and I had to have so many horses to go over the hill. I was short horses.

Q. So you needed extra horsepower to push the train over the hill?

A. That's right.

Q. And Mr. Russell has already told us your consist was 130 cars?

A. As I recollect in that neighborhood.

* * *

[p. 186] lights, do you recall approximately how fast you would have been going?

A. Really do not know because I was in the process of stopping my train.

Q. Okay. Now, can you give us just your best recollection? Would you think you were going more than ten miles an hour at the time you came to the point where you tripped the gates, or less than ten miles an hour?

A. I'd say greater, because I hadn't cleared the hot box detector yet.

Q. Okay. Would it be greater than 15 miles an hour?

A. No.

Q. Okay. So between 10 and 15, am I correct?

A. That's correct.

Q. And from that point on, as I get the picture, you are gradually coming to a stop?

A. Right.

Q. All right. Okay. Now, do you happen to recall approximately where you came to a stop that evening, February 7th, 1994?

A. There was a sizable tree on the left-hand side of the rail. I was well west of that or behind it.

Q. And if I recalled correctly, you and Mr. Russell and I think Mr. North from ENS about a year after this happened, went out together and kind of compared notes as

* * *

APPENDIX G

[Excerpts From The Testimony Of J.D. Russell]

* * *

[p. 715] A. Yes.

Q. You can do it safely and easily?

A. Yes.

Q. And then what you do after you get off the engine, if your intent is to go up and protect the crossing, there's plenty of space on the railroad right-of-way, the jury was out there and saw the right-of-way, so you can walk from wherever you're starting, you can walk completely free of the tracks and in complete safety and walk down to the crossing?

A. Yes.

Q. In this case if you were 500 feet away or 300 feet away or what have you, you certainly had time to walk to the crossing before ENS 401 arrived?

A. No, I didn't even have my coat or boots on.

Q. I understand that. You say you were doing things after the train came to a stop before you left?

A. I was getting – when he came to the stop I was getting my coat and boots to go on up there to protect the crossing.

Q. You remember you were not doing your paperwork then?

A. No.

Q. You were putting on your boots, the five buckle artics [sic], and getting your heavy gear on?

A. Yes.

Q. I think in a deposition you said you may have been

* * *

[p. 151] THE COURT: And do they then tell you when they have accomplished the disconnect?

THE WITNESS: Yeah, they acknowledge it.

THE COURT: And you say that takes about five minutes?

THE WITNESS: Yeah, about all it takes.

THE COURT: So you will be there for five minutes no matter what while the disconnect takes place?

THE WITNESS: Yeah.

THE COURT: All right. Thank you.

MR. MURRAY: And I want to thank you, your Honor, because I will confess I didn't understand that.

BY MR. MURRAY:

Q. During that five minutes or so, what do you do as the conductor?

A. Well, that day I was getting my clothes on, I was going to walk up to the crossing.

Q. Okay. I understand, but I think my question is in relation to this function of getting the helper train

released, do you have a job that you have to do at the front end?

A. Well, like if we don't have no crossing to block, no, generally don't, no.

Q. So my question is this: You stop at 5:50, let's assume hypothetically, and I wanted you to know I told this

* * *

APPENDIX H

[Excerpts From The Testimony Of Jeanne Nagucki]

* * *

[p. 305] cars from over there on the side there. Just show us what you remember those cars doing.

A. They would come up the road, and they would just – it would be a short pause.

Q. Ah-hah.

A. And then they would go on through.

Q. All right.

A. And that was approximately five to seven coming from the Wooster area.

Q. All right.

A. Towards Orville.

Q. All right. Now, ma'am, while I have you there, what do you remember – did that – did that happen consecutively? Did those five to seven cars all come by you in a sort of a line of traffic?

A. Yes.

Q. All right. And what do you remember next?

A. Okay. After that, then cars on my side – well, first off I said to my boy at that point, "Do you think that we should go," and because I thought we were just sitting there because of the stopped train and I wasn't sure how long we would be sitting there.

He told me, "No mommy, don't go. What if that train starts moving." So that kind of stuck in my mind.

So I sat there awhile longer and then approximately

* * *

[p. 325] was no other traffic in front of you in the same lane but there was traffic opposing you and it began driving around the downed gates; is that correct?

A. Yes.

Q. And those gates had been down ever since you had crested the hill; is that correct?

A. Yes.

Q. Did you see the flashing lights at any time at the crossing?

A. I can't recall that.

Q. Okay. If people testified the flashing lights were on, would you dispute that?

A. I'd say I'm not sure. I – I can't say one way or another.

Q. Okay. And then it became apparent to you, did it not, that other drivers behind you in the same direction of travel were pushing to get across this crossing; is that correct?

A. Yes.

Q. And that you became concerned that these other – about this other traffic; is that correct?

A. Yes, it did put me under pressure a little bit.

Q. Okay. And then you even felt enough pressure that you talked to your son and said to your son, "Do you think this is safe"; is that correct?

* * *

APPENDIX I

[Excerpts From The Testimony Of Tom Gardner]

* * *

[p. 661] horn and what I'm looking for is any time you see a zero it means the horn is not on and a one means that it's being blown.

There's a magnet valve that's basically being picked up. As you go down through here, what I'm looking for is also a number of things. The particular accident we're looking at here, I look at the auto pressure to see what that's showing. I look at current with the throttle position, I'm looking over where it says PKD. That's power knock down and EIE is engineer initiated emergency. It says he put that in emergency.

At that point you look over in the horn channel and it's showing a one at that time. Then you look back and it shows a series of ones that goes back in a time interval from that location.

Q. How long is that time interval?

A. It's going from 1901, 16 seconds to 1901, 56 seconds which is 40 seconds.

Q. Now you've mentioned something, EIE, did I get that right?

A. Right. That's engineer initiated emergency. That's a separate channel in the recorder.

Q. That's about the third or fourth line down on the strip sheet from the bottom?

A. That's correct.

* * *

APPENDIX J

[Excerpts From The Testimony Of William Berg]

* * *

[p. 453] believe would be reasonable to expect.

Q. I don't think it's a tough question. I'm asking you whether or not in every time that you analyzed cars going around downed gates, you use ten miles an hour as the speed for the cars?

A. I don't know that I can answer that. I'm trying to think of other situations that – where I have done this type of analysis under similar circumstances.

And I'm not sure that I can bring anything to mind where I can answer the question that I did this same or something that was different.

Q. All right. You testified, I believe, that Engineer North would have seen the crossing at 1440 feet; is that correct?

A. Somewhere around 14, 1500 feet would be the first practical opportunity to have seen the crossing.

Q. And at 1500 feet, at a track speed of 60 miles an hour, how many seconds would it take Mr. North to reach the crossing?

A. At 1500 feet?

Q. Yes.

A. About 17 seconds.

Q. And I want to talk to you, ask some questions now about the values reflected in feet of what we saw on

the screen. We saw two pictures; we saw one picture of kind of

* * *

APPENDIX K

49 USC Sec. 20106

TITLE 49 – TRANSPORTATION

SUBTITLE V – RAIL PROGRAMS

PART A – SAFETY

CHAPTER 201 – GENERAL

SUBCHAPTER I – GENERAL

Sec. 20106. National uniformity of regulation

Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order –

(1) is necessary to eliminate or reduce an essentially local safety hazard;

(2) is not incompatible with a law, regulation, or order of the United States Government; and

(3) does not unreasonably burden interstate commerce.

(3)

Supreme Court, U.S.
FILED
SEP 4 1998
CLERK

No. 98-064

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

REBECCA A. JONES, EXECUTRIX OF THE ESTATE OF SCOTT R. JONES, DECEASED,
Petitioner,

v.

CONSOLIDATED RAIL CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF TO THE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Introduction

Conrail makes three arguments, stated in the alternative, that raise points not made in Petitioner's brief. First, Conrail presents an interpretation of the applicable regulations that, as we will show, is at substantial variance with their plain language and intent. Second, Conrail contends that "even if the Court were to announce" that the use of alternate measures is required by federal regulations, "a retrial of this case under that ruling would not change the outcome here." (Respondent's brief at p. 4). Finally, the railroad contends that "petitioner failed to raise the issue presented here in the trial court." (Respondent's brief at p. 5, 6). This reply will show that these contentions, intended to diminish the importance of this Petition, are wrong as a matter of fact and law.

I. CONRAIL'S RESPONSE DISTORTS THE PLAIN MEANING OF THE FEDERAL REGULATIONS IN DEFENSE OF A CONTINUING PRACTICE THAT UNDERMINES CONGRESSIONAL INTENT.

Conrail's interpretation of the applicable regulations is summarized at page 7 of Respondent's brief:

> A warning system that gives positive warning of the 'presence' of a train is an 'active' warning system under the regulation, whether or not it provides a positive warning of the approach of a train. The signal at the Back Orrville Road was an 'active' system on the evening of the accident. (Emphasis added).

This interpretation negates the plain meaning of language that

unequivocally mandates that automatic warning devices "shall be maintained to activate in accordance with the design of the warning system . ." 49 C.F.R. §234.225 (emphasis added). The essence of the design, as spelled out in 23 C.F.R. §646.204(j), is the ability of the system to "display to motorists a positive warning of the approach or presence of a train." Because automatic warning devices are able to "change aspect upon the approach or presence of a train," they are defined in the regulations as "active" warning devices. The term "active" literally means the ability to give motorists a "positive" notification that the arrival of a train is imminent.

Notwithstanding the manifest intent of these regulations to ensure that motorists receive a positive signal indicating that the arrival of a train is imminent, Conrail advances an argument that turns the plain meaning of the regulatory language and the intent of Congress on its head. According to Conrail, the terms "active" and "activated", as used in the regulations, mean the same thing. Therefore, the warning system is being maintained in accordance with its design so long as the devices are mechanically operational and regardless of whether or not they can provide a positive signal that the arrival of a train is imminent. This leads to the absurd conclusion that the Congressional intent expressed in these regulations is complied with if the warning system is able to indicate the presence of a stopped train that is not approaching but is unable to provide motorists with a positive signal that another train is approaching.

Conrail's response makes it clear that it views the practice of keeping trains stopped within the circuitry near multi-track crossings equipped with federally mandated automatic warning devices, without taking measures to prevent a crash if another train approaches, as fully compliant with federal regulations. This interpretation of the regulations helps to explain why, notwithstanding the expenditure of billions in federal funds to equip crossings with automatic warning systems, there were 1,889 fatal crashes between 1982 and 1992 at

crossings equipped with federally mandated automatic warning devices. (Petition App. II at p. 219a). Conrail's response also shows why the needless carnage being caused by this deadly practice will continue unless this Court effectuates Congressional intent expressed in these federal regulations by establishing a bright line standard requiring preventative measures when a train stops near a main line crossing and disables automatic warning devices from operating in accordance with their intended design.

This fact becomes even clearer in light of Conrail's response regarding 49 C.F.R. §234.209 that requires safety measures when the "normal functioning" of automatic warning devices is interfered with by a train "standing within the system's approach circuit." Conrail argues that the requirements of this regulation were not violated because "the signal system was operating properly, as designed, and Conrail's engineer was operating the train lawfully and in accordance with Conrail's rules." (Respondent's brief at p. 4). According to Conrail, the "FRA expressly rejected any requirement that railroads provide alternative warnings when signal systems are activated by trains engaged in normal train movements, such as those in which INPI-7 was engaged." (Respondent's brief at p. 8). What Conrail is here saying is that the FRA intended to allow railroads to keep trains stopped within the circuitry as long as they wish and, so long as the system is mechanically operational, this practice should not be interpreted as interference with the normal functioning of the system; and, therefore, there is no need to take "measures to provide for the safety of highway traffic that depends on the normal functioning of such system." In other words, the FRA has given railroads a green light to stop trains within the circuitry near multi-track crossings without doing anything to protect against a train/car collision.

What makes the need for this Court's intervention so urgent is the fact that the extant confusion on the part of courts regarding the intent of these regulations has created a disincentive for railroads to use cost-free measures that can easily

provide for the safety of traffic that depends on the normal functioning of automatic warning devices. The evidence in the instant case, for example, showed that the Jones catastrophe could have been prevented by (1) placing a flagger at the crossing while another train was approaching; (2) advising the moving train by radio of the danger and directing it to reduce its speed to a safe level as it approached the crossing; or (3) blocking the crossing with one of the engines from the stopped train during periods of danger. Because the railroad knew well in advance that it would stop a train at the Back Orrville Road crossing, these measures could have been used without delay or cost to the railroad. Consequently, there is simply no legal, moral or economic justification for permitting railroads to blatantly disregard Congressional intent by continuing this deadly practice unchanged; and that, in the final analysis, is why a writ should issue in this case.

II. CONRAIL'S RESPONSE SUBSTANTIALLY MISINTERPRETS THE RELATIONSHIP BETWEEN *LANDRIGAN* AND THE APPLICABLE REGULATIONS.

Conrail's response becomes even more untenable when it turns to this Court's decision in Baltimore & P.R. v. Catharine Landrigan, 191 U.S. 461 (1903). According to Conrail, Landrigan is irrelevant to this inquiry because in that case, "the gate operation was not automatic, i.e., 'activated' by the approach or 'presence of a train,' as specified under 23 C.F.R. §646.204(j)." Because the crossing in Landrigan did not have an automatic warning system, Conrail contends that "it was not an `active warning' system as defined by FRA . . (and, therefore,) the Court's decision in Landrigan cannot be applied to affect the scope of a railroad's duty at today's active-warning crossings." (Respondent's brief at p. 9).

The plain language of 23 C.F.R. §646.204(j) shows why this argument requires a reply. The regulation states:

> Active warning devices means those traffic control devices activated by the approach or presence of a train, such as flashing lights, automatic gates and similar devices, as well as manually operated devices and crossing watchmen, all of which display to motorists a positive warning of the approach or presence of a train. (Emphasis added).

It is precisely this language which, as Petitioner has shown, expresses the intent of Congress in these regulations to effectively codify this Court's reasoning in Landrigan. That one of this nation's major railroads could be so unapologetically dismissive of this Court's reasoning in Landrigan, particularly in the face of such unambiguous regulatory language, provides stark proof of the need for this Court to revisit Landrigan and to bring that decision's clearheaded and commonsensical approach to grade crossing safety to bear on these regulations in a way that will effectuate congressional intent.

III. CONRAIL'S RESPONSE CONTAINS MATERIAL MISSTATEMENTS OF FACT THAT DERROGATE THE IMPORTANCE OF THE ISSUE RAISED BY PETITIONER.

Conrail makes several factual assertions that need to be corrected in order that this Court not be misled regarding the importance of this Petition. First, Conrail contends that, contrary to Petitioner's assertions, the INPI-7 train "was stopped for only a few minutes" prior to the arrival of Scott Jones, and not for "at least ten minutes" as Petitioner claims. This implies that the Petitioner is making a mountain out of a molehill and that the Jones case is not an indication of a practice that warrants this Court's intervention.

The testimony and evidence, including Conrail's own official time records (Petition App. EE at 192a), however,

overwhelmingly support Petitioner's version of the record. In fact, the trial court, in a post-trial Memorandum Opinion, expressly found as follows:

> The plaintiff's proposition that the defendant was negligent as a matter of law is anchored in the undisputed fact that the signal gates and flashers that protected the crossing had been activated at least 10 minutes earlier when another of the defendant's trains headed in the opposite direction had activated the signal system for the crossing. (Petition App. C at 9a) (Emphasis added).

Moreover, numerous witnesses testified that Conrail regularly stops trains on the north side of this crossing with the gates and lights activated for extended periods. (Petition App. JJ-LL, p. 220a-226a).

This attempt by Conrail to shorten the time its train was stopped prior to the crash implicitly reflects Conrail's recognition that an extended activation of automatic warning devices calls for preventative measures to prevent a train/car collision. In fact, as Petitioner has shown, the railroad industry has known for many years that automatic warning systems rapidly lose credibility with motorists when lights continue to flash and gate arms remain down for longer than a minute without the arrival of a train. Since it makes no difference to a motorist how long automatic devices are activated if the system is unable to signal the approach of a train, this fact renders academic Conrail's attempt to shorten the time its train was stopped.

Second, Conrail contends that the "jury's finding that Conrail was not negligent was correct and supported by the evidence even under the duty argued by the petitioner here," because "Conrail's crew was attempting to provide supplemental warnings to motorists at the crossing." (Respondent's brief at

5). This insinuates that Conrail has rules that require preventative measures under the circumstances at issue. The truth is that the undisputed testimony of Conrail's employees in this case established that the railroad's rules do not require the use of preventative measures when, as in the instant case, a train remains stopped within the circuitry near a main line multi-track crossing. (Petition App. L at 78-a, 81-a, 82-a and App. M at 89-a).

Compelling confirmation that Conrail's rules do not require preventative measures can be found in Wightman v. Consolidated Rail Corporation, 94 Ohio App.3d 389 (1984); Erie Cty. Ct. of Appeals, E-97-001 (1997), discussed at p. 9 of Petitioner's brief. In Wightman, a Conrail train stopped near a main line crossing in Ohio to make mechanical repairs. As did the engineer and conductor of the stopped train in the instant case, the engineer and conductor of the stopped train in Wightman knew that a dangerous situation existed and that high speed trains were due. Nevertheless, no measures were taken to prevent a crash and, after the warning system had been activated for at least 40 minutes, a freight train traveling 60 mph struck a passenger car, killing two teen-age girls. The second trial in Wightman to determine punitive damages, which took place after the Jones trial, resulted in a punitive damage award against Conrail of $25 million for failing to take preventative measures. As in Jones, the crux of the matter in Wightman was Conrail's failure to take safety measures during an extended activation of flashing lights and automatic gates. Since the standing train was an obstruction to the operator of the Wightman car and, therefore, created a situation even more dangerous than that which confronted Scott Jones, it is clear that Conrail's rules do not require preventative measures, regardless of how dangerous are the circumstances caused by the extended activation.

Finally, Conrail's factual recitation portrays Scott Jones as negligent for driving up "to a railroad grade crossing where the roadway was closed to traffic by automatic gates and flashing

lights and for failing to look and listen for the train" that was visible "for at least 17 seconds before the accident." (Respondent's brief at 3). These assertions nicely express a corporate attitude that was roundly rebuked in Landrigan. In that case, as is Conrail's practice today, the railroad routinely allowed gates to remain down, regardless of whether or not the approach of a train was imminent. Plaintiff's decedent was struck and killed by a train as he crossed the tracks and this Court found that, under such circumstances, the gates provided "warning of nothing" and had "no more relation to passing trains than the signal tower or any inanimate object at or near the crossing." Landrigan at 475 of Petitioner's brief at 15. Consequently, the Landrigan court held that it is irrational to find a plaintiff negligent as a matter of law for proceeding around gates that have been rendered useless as a warning device by the railroad's failure to maintain them in accordance with their design.

Notwithstanding Landrigan or the existence of a regulatory scheme manifestly intended to codify its reasoning, Conrail obviously believes that, under the current status of the law, it has every right to cause an extended activation, deprive motorists of a positive signal that a train is approaching, place the entire burden of detecting the presence of a train on motorists, and, if a catastrophe does occur, charge the driver, who decided to proceed rather than wait until the railroad was ready to unblock the highway, with sole responsibility for the crash. Because the courts below, as other courts have done, accepted this interpretation of the law, we urge this Court to intervene and rule that federal law does not countenance this deadly and unconscionable operating practice.

IV. CONRAIL'S CONTENTION THAT JONES FAILED BELOW TO RAISE THE ISSUE PRESENTED HERE MISSES COMPLETELY THE POINT OF THIS PETITION.

Jones vigorously sought a ruling in the trial court, through summary judgment, by a motion for directed verdict, and by requested jury instructions, that Conrail was negligent as a matter of law for failing to take measures to prevent a train/car collision while the automatic warning devices were disabled from providing motorists with a positive signal that the arrival of a train was imminent. Nevertheless, Conrail contends that the issue raised here was not raised below because in a post-trial memorandum "petitioner's counsel wrote that this liability theory 'struck him like a lightning bolt several days after the jury's verdict . . .'" (Respondent's brief at p. 6). This attempt by the Respondent to turn this Petition into a quibble over how Jones characterized the railroad's acts and omissions below misses the point completely and thereby shows why intervention of this Court is so urgently needed.

What struck Petitioner's counsel "like a lightning bolt several days after the jury's verdict" was not the need for a new legal theory but, rather, that he had failed to fully appreciate the fact that this Court, almost 100 years ago, had cogently articulated in Landrigan the rationale underlying the entire regulatory scheme intended to ensure that federally mandated warning systems are "maintained to activate in accordance with the design of the warning system." That Petitioner's counsel missed this fact is hardly surprising since, as Petitioner has shown, courts have almost universally failed to grasp the significance of Landrigan and, thereby, have opened the door for railroads to pursue the strategy reflected in the arguments Conrail raises here. Indeed, the very fact that distinguished judges below accepted Conrail's argument that mechanical operation of automatic warning devices should be equated with providing motorists with an "active" warning of danger, dramatizes the need for this Court to intervene to correct an ongoing pattern of conduct by railroads that can be directly traced to the failure of lawyers and judges alike to grasp what this Court so clearly saw nearly 100 years ago, namely, that crossing gates that are allowed to remain closed can provide

motorists with "warning of nothing." In a nutshell, that is why a writ should issue in this case.

Finally, it is worth noting that when Jones moved for a new trial on the basis that the Court's instructions had erroneously failed to incorporate duties imposed on railroads by federal law, the trial court acknowledged that Jones's motion presented "a comprehensive and compelling argument . . . when the competing interests of the safety of the motoring public and the complexities of the operation of a railroad are considered." After thus recognizing the importance of the issue raised by petitioner here, Judge David Dowd ruled that "the best opportunity for a definitive decision on the issues raised by . . . (Jones's) motion" was an appeal to the United States Court of Appeals for the Sixth Circuit. (Petition App. C, p. 12a). It is the fact that the Sixth Circuit's decision undermines Congressional intent, at great cost to public safety and without any benefit to railroads, that makes the need for this Court's intervention so compelling.

CONCLUSION

The Court should grant Jones's Petition for a Writ of Certiorari.

Respectfully submitted,

/S/_____

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Date: September 4, 1998

APPENDIX

APPENDIX JJ

UNITED STATICS DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Rebecca A. Jones, Plantiff,	))
	) Judge David Dowd
v.	) Akron, Ohio
	) Civil Action
Consolidated Rail Corporation, Defendant.	) No. 5:94CV2021)

TRANSCRIPT OF PROCEEDINGS HAD BEFORE
THE HONORABLE DAVID D. DOWD,
JUDGE OF SAID COURT, AND A JURY,
ON THURSDAY, MAY 2, 1996.

VOLUME 2

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Proceedings recorded by mechanical stenography; transcript produced by computer - aided transcription.

* * *

[p.251]

Jackie Krajcik - Cross

Q. Okay. And I assume from time to time there is a lot of traffic there and the drivers are rather impatient; is that correct?

A. Yes, because you can go there and you can sit for a long, long time, um-hum.

Mr. Godshall: Thank you very much.

The Witness: Okay.

Mr. Murray: Just one question.

REDIRECT EXAMINATION OF JACKIE KRAJCIK BY MR. MURRAY:

Q. How do you know that you can go there and sit for a long, long time?

A. I've sat there for varous amounts of times, and plus people, lots of people have always complained about what can happen, you can get there and have to sit from anywhere from five minutes to maybe a half hour, maybe longer. I mean --

* * *

APPENDIX KK

UNITED STATICS DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Rebecca A. Jones,	)
Plantiff,	)
	) Judge David Dowd
v.	) Akron, Ohio
	) Civil Action
Consolidated Rail Corporation,	) No. 5:94CV2021
Defendant.	)

TRANSCRIPT OF PROCEEDINGS HAD BEFORE
THE HONORABLE DAVID D. DOWD,
JUDGE OF SAID COURT, AND A JURY,
ON THURSDAY, MAY 2, 1996.

VOLUME 2

Veronica Zimmerman - Direct

[p.274]

Q. How often as of, say, February of 1994 would you have been driving either way on Back Orville Road over the

crossing?

A. I drove every day until I moved to Orville.

Q. Had you ever encountered that same situation previously, that is gates down, traffic proceeding, stopped train?

A. Yes.

* * *

APPENDIX LL

UNITED STATICS DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Rebecca A. Jones,	)
Plantiff,	)
	) Judge David Dowd
v.	) Akron, Ohio
	) Civil Action
Consolidated Rail Corporation,	) No. 5:94CV2021
Defendant.	)

TRANSCRIPT OF PROCEEDINGS HAD BEFORE
THE HONORABLE DAVID D. DOWD,
JUDGE OF SAID COURT, AND A JURY,
ON THURSDAY, MAY 2, 1996.

VOLUME 2

Matt Seiler - Direct

[p. 338]

Q. If you would be kind enough to show us what you observed regarding change in railroad activity at that time.

A. Most of the trains would stop in this area.

Q. Okay. Would you just identify "this area" so it's in the record for us? Please address the jury, if you would.

A. In this area it's wide open, there is nothing here, and this is in between the big oak tree and the utility shed here.

Q. Okay.

A. And as I stated I lived there so I could see this whole portion of the railroad tracks.

Q. All right. Now, how often during that period of time, that is between the point where they went to one track to the southeast, how often would you observe trains stopped to what would be the northwest side of the crossing?

A. Daily.

Q. All right. When you would observe trains stopped there, can you give us some indication how many of those trains would be back in the area you have just indicated, what percentage?

A. Ninety.

Q. What about the other ten percent?

A. Be back behind the tree.

* * * *